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INTERNATIONAL LAW AND INTERNATIONAL RELATIONS THEORY: A DUAL AGENDA

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INTRODUCTION

Writing in 1968 on the "relevance of international law," Richard Falk described his efforts as part of the larger endeavor of "liberating the discipline of international law from a sense of its own futility."¹ In 1992 that task appears to have been accomplished. International legal rules, procedures and organizations are more visible and arguably more effective than at any time since 1945. If the United Nations cannot accomplish everything, it once again represents a significant repository of hopes for a better world. And even as its current failures are tabulated, from Yugoslavia to the early weeks and then months of the Somali famine, the almost-universal response is to find ways to strengthen it. The resurgence of rules and procedures in the service of an organized international order is the legacy of all wars, hot or cold.

For international lawyers, both practitioners and professors, this is the end of a long journey. As Thomas Franck proclaims, we are finally in a "post-ontological" era.² But the existential limbo of the decades since 1950 took its toll in many ways, from the open disdain of highly visible public figures,³ to deeper damage to the ability of the discipline to renew itself by attracting younger scholars. A particular casualty was the opportunities and prospects for sustained interdisciplinary collaboration with international relations scholars in political science.

Just as constitutional lawyers study political theory, and political theorists inquire into the nature and substance of constitutions, so too should two disciplines that study the laws of state behavior seek to learn from one another. At the very least, they should aspire to a common vocabulary and framework of analysis that would allow the sharing of insights and information.⁴ If social science has any validity at all, the postulates developed by political scientists concerning patterns and regularities in state behavior must afford a foundation and framework for legal efforts to regulate that behavior. For instance, if it could be reliably shown

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¹ Richard A. Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, in *THE RELEVANCE OF INTERNATIONAL LAW* 133, 142 (Karl W. Deutsch & Stanley Hoffmann eds., 1968).

² Thomas M. Franck, *Principles of Fairness in International Law* (paper presented at Annual Meeting of American Political Science Association, Chicago, IL, September 1992).

³ See, e.g., Robert Bork, *The Limits of 'International Law'*, *NAT'L INTEREST*, Winter 1989/90, at 3.

⁴ In probably the most successful effort to bridge this disciplinary divide, Louis Henkin lamented that "the student of law and the student of politics . . . purport to be looking at the same world from the vantage point of important disciplines. It seems unfortunate, indeed destructive, that they should not, at the least, hear each other." *LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 4 (2d ed. 1979).

that a great-power condominium was the best guarantee of international peace, then international law and organization should accommodate and support an arrangement that confers special privileges on a group of great powers. On the other hand, if the prospects for peace hang on some other set of state characteristics, then international security organizations and norms designed to regulate the use of force should be reshaped accordingly. From the political science side, if law—whether international, transnational or purely domestic—does push the behavior of states toward outcomes other than those predicted by power and the pursuit of national interest, then political scientists must revise their models to take account of legal variables.

Notwithstanding the logic and intellectual appeal of this vision, interdisciplinary efforts fell victim for most of the postwar era to the “Realist challenge”: the defiant skepticism of Political Realists such as George Kennan, Hans Morgenthau and, more recently, Kenneth Waltz that international law could ever play more than an epiphenomenal role in the ordering of international life. Much of the theoretical scholarship in both international law and international relations can be understood as either a response to or a refinement of this challenge. Many international lawyers attempted to reconceptualize international law in relation to international politics, seeking to relate the two disciplines without sacrificing one entirely. Political scientists by and large paid little attention, preferring to contest Realist methodology along various lines and to build increasingly abstract “systemic” theories of state behavior.

Beginning in the late 1970s, however, an important group of mainstream international relations theorists laid the foundation for a more fundamental attack on core Realist propositions concerning the role and relevance of international institutions. The result was a new emphasis on the role and impact of international “regimes,” the principles, norms, rules and decision-making procedures that pattern state expectations and behavior. As international lawyers soon realized, this was international law by another name. By the end of the 1980s, regime theory had been subsumed under the more general rubric of Institutionalism, a powerful, although often complementary, alternative to Realism.

Part I of this article maps this postwar trajectory, seeking to delineate the major features of the interdisciplinary landscape and to provide an introduction to the relevant literature for scholars in both disciplines. A second and equally important goal, however, is to provide the necessary background for an exploration of interdisciplinary options in the 1990s. Happily, the dawning of a new era in global politics coincides with what may be greater convergence in some areas of international law and international political science than ever before. The result is a dual agenda in interdisciplinary scholarship, bridging to two distinct theoretical traditions in political science: Institutionalism and Liberalism.

Part II describes the Institutional agenda, a research program already being pursued by prominent scholars in both disciplines. Institutionalists and international lawyers subscribe to a common ontology of the international system: the actors, the structure within which those actors act, and the process of their interaction. Both groups, separately and together, are describing a common agenda focused on the study of improved institutional design for maximally effective international organizations, compliance with international obligations, and international ethics.

Although a broad avenue with many promising vistas, the Institutional road to interdisciplinary collaboration is only one possible route, with an inevitably limited set of destinations. Part III proposes another path, equally promising, but

considerably more challenging. This new interdisciplinary bridge involves the application of "Liberal" international relations theory to law within and among nations. Liberals focus not on state-to-state interactions, at least not in the first instance, but on an analytically *prior* set of relationships among states and domestic and transnational civil society. The "black box" of sovereignty becomes transparent, allowing examination of how and to what extent national governments represent individuals and groups operating in domestic and transnational society. Democracies, or, more precisely, "liberal states," are presumed to behave differently from dictatorships, not only domestically but also internationally. Their relations with one another are shaped in important ways by domestic, transnational and international law, as are their relations with nonliberal states. Liberal international relations theory offers a way of conceptualizing the contributions of these bodies of law to the traditional goals of international order, while highlighting important patterns and breaks in current legal doctrines.

The Liberal agenda will require international lawyers to revise their most fundamental conceptions of the international system. The rewards are worth it, however; this approach permits the construction of a comprehensive legal framework that links factors and trends of interest to the widest possible spectrum of international lawyers, from traditional specialists on questions such as national self-determination, to human rights activists, environmental lawyers, trade experts and international litigators and deal makers. Moreover, the Liberal agenda *complements* the Institutionalist agenda as the study primarily of law among liberal states. Many of the world's most pressing problems are left to the Institutionalists. In sum, the dual agenda is a unified agenda, offering powerful tools and a cornucopia of research opportunities for all students of international law and politics.

I. THE POSTWAR TRAJECTORY

The Realist Challenge

The discipline of international relations was born after World War I in a haze of aspirations for the future of world government. These were quickly dimmed by World War II. The fledgling discipline was thus weaned on Political Realism, articulated and systematized by scholars such as Hans Morgenthau, Georg Schwarzenberger, E. H. Carr and George Kennan.⁵ These seasoned observers of the interwar period reacted against Wilsonian liberal internationalism, which presumed that the combination of democracy and international organization could vanquish war and power politics. They believed instead in the polarity of law and power, opposing one to the other as the respective emblems of the domestic versus the international realm, normative aspiration versus positive description, cooperation versus conflict, soft versus hard, idealist versus realist. Regardless of their domestic colors, states in the international realm were champions only of their own national interest. "Law," as understood in the domestic sense, had no place in this world. The only relevant laws were the "laws of politics," and politics was "a struggle for power."⁶

⁵ Some other notable Realists were Reinhold Niebuhr, Arnold Wolfers and Robert Strausz-Hupé.

⁶ HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 4-5, 25-26 (4th ed. 1967). Although many of the fathers of the United Nations would have argued that it was founded precisely on a Realist recognition of the necessities of power politics—hence the special privileges for the great powers sitting on the Security Council—Morgenthau specifically cites "the great attempts at organizing the world, such as the League of Nations and the United Nations," as

From the Realist perspective, Woodrow Wilson and his followers were the high priests of the “legalist-moralist” tradition in American foreign policy, a tradition naively projecting the ordered domestic existence of a liberal state onto the inherent anarchy of the international system.⁷ By trying to guarantee peace through an international organization dedicated to the high-minded ideals of Wilson’s Fourteen Points, the Wilsonians disarmed themselves in the face of rising fascist power. More generally, wrote Kennan, they misunderstood the relative functions and capacities of law and diplomacy:

History has shown that the will and the capacity of individual peoples to contribute to their world environment is constantly changing. It is only logical that the organizational forms (and what else are such things as borders and governments?) should change with them. The function of a system of international relationships is not to inhibit this process of change by imposing a legal straitjacket upon it but rather to facilitate it: to ease its transitions, to temper the asperities to which it often leads, to isolate and moderate the conflicts to which it gives rise, and to see that these conflicts do not assume forms too unsettling for international life in general. *But this is a task for diplomacy, in the most old-fashioned sense of the term. For this, law is too abstract, too inflexible, too hard to adjust to the demands of the unpredictable and the unexpected.*⁸

This, then, was the Realist challenge to international lawyers: a challenge to establish the “relevance” of international law.⁹ International legal theorists had long grappled with the theoretical conundrum of the sources of international legal obligation—of law being simultaneously “of” and “above” the state. Yet the endless debates on this question nevertheless assumed that international legal rules, however derived, had some effect on state behavior, that law and power *interacted* in some way, rather than marking opposite ends of the domestic-international spectrum. Political Realists, by contrast, gave no quarter. Their challenge struck at the heart of the discipline, claiming that international law was but a collection of evanescent maxims or a “repository of legal rationalizations.”¹⁰

The Realist challenge was not merely academic posturing. It was mounted by one of the major architects of postwar foreign policy and formulated in terms of

efforts to implement the wrongheaded “conviction that the struggle for power can be eliminated from the international scene.” *Id.* at 10.

Morgenthau did imagine some role for international law, as Francis Boyle has also noted, but few scholars or practitioners have read him or his fellow Realists this way. See Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AJIL 260 (1940); FRANCIS A. BOYLE, *WORLD POLITICS AND INTERNATIONAL LAW* 3–16 (1985). Georg Schwarzenberger also defended the possibility of international law and organization in those limited contexts in which power politics did not rule.

⁷ GEORGE KENNAN, *AMERICAN DIPLOMACY, 1900–1950* (1951). Kennan linked the “legalist-moralist” approach, a term he coined, to the predominance of lawyers among American foreign-policy makers, in addition to a broader effort to “transpose the Anglo-Saxon concept of individual law into the international field and to make it applicable to governments as it is applicable here at home,” to establish world order as we had once established a revolutionary national order. *Id.* at 95. See also Arnold Wolfers, *Introduction: Political Theory and International Relations*, in *THE ANGLO-AMERICAN TRADITION IN FOREIGN AFFAIRS* at ix (Arnold Wolfers & Laurence W. Martin eds., 1956).

⁸ KENNAN, *supra* note 7, at 95 (emphasis added).

⁹ This was the title of an excellent 1968 *Festschrift* in honor of Leo Gross, which was edited by two noted political scientists and included both international lawyers and political scientists. See *supra* note 1.

¹⁰ Falk, *supra* note 1, at 138.

policy prescriptions that ignored law and lawyers. The efforts to answer it shaped the evolution of postwar international legal scholarship.

The Legal Response: Reconceptualizing Law and Politics

The chief legal or jurisprudential response to the Realist challenge was the reconceptualization of the relationship between international law and politics. Different international legal scholars obviously responded differently. Yet all their efforts share certain characteristics. First, all sought to relate law more closely to politics, pushed not only by the challenge of the Political Realists, but also by that of the Legal Realists, who had decisively demonstrated that legal doctrines inevitably reflected underlying policy choices.¹¹ Second, as part of this mission, all redefined the form of law, moving in some measure from rules to process.¹² Third, all reassessed the primary functions of law. Whereas rules guide and constrain behavior, providing triggers for sanctions, processes perform a wider range of functions: communication, reassurance, monitoring and routinization.¹³

Each of the sections that follow addresses a school of thought that can be identified as a distinct response to the Realist challenge. However, no effort is made to offer a comprehensive intellectual history of either discipline. The point is rather to provide a road map of self-conscious efforts to reconceptualize international law in a way that would demonstrate its relevance to international politics, and thus to rebuild a foundation for interdisciplinary scholarship.

Law as policy science. The first and most comprehensive response to the Realist challenge was that of Myres McDougal and Harold Lasswell, a brilliant team at

¹¹ There is a rich irony here. Both the Legal Realists and the Political Realists can be understood, in their extreme form, as having argued that law is indistinguishable from politics. Yet the Legal Realists argued that law subsumed politics; the Political Realists claimed that politics proceeded entirely independently of law. The difference, of course, is that the Legal Realists sought to demythologize a legal system in which legal *institutions*—lawyers and judges—unquestionably wielded great power. Political Realists, on the other hand, sought to demythologize a legal system in a society in which legal institutions were weak. The response to both critiques could thus be exactly the same, a move that endowed law with less autonomous power than thought by the formalists but more than perceived by the Realists of either stripe.

¹² David Kennedy is the great chronicler of this shift, although he conceptualizes it somewhat differently as a “preoccupation . . . with a process which might convince us of international law’s *being* by imagining it in relationship to something else—often thought of as ‘political authority.’” David Kennedy, *A New Stream of International Law Scholarship*, 7 *WIS. J. INT’L L.* 1, 2 (1988). His account is a more self-referential description of the collective psychology of the discipline, describing what I call the Realist challenge as an internal identity crisis.

¹³ This redefinition of legal function was accomplished in two contradictory, but similarly motivated, maneuvers. On the one hand, some scholars argued that international law is like domestic law, but that domestic law operates in far more complex and subtle ways than by simply restraining behavior. See, e.g., ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, *INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE* at xiii–xv (1968) (domestic law is not so court-driven as we might suppose, and thus the absence of effective judicial institutions in the international realm is a difference in degree rather than kind); Roger Fisher, *Bringing Law to Bear on National Governments*, 74 *HARV. L. REV.* 1130 (1961) (domestic *private* law is enforceable by the power of the state, but not so domestic *public* law such as constitutional and administrative law; thus, absence of coercive enforcement option does not differentiate international law from many important types of domestic law); William Coplin, *International Law and Assumptions About the State System*, 17 *WORLD POL.* 615 (1965) (both international and domestic law communicate society’s conception of itself). On the other hand, an equally ardent group of scholars have argued that the domestic analogy is false and misleading; international law must be understood as law in a very different context. See, e.g., RICHARD A. FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* (1970); *Introduction to INTERNATIONAL LAW AND ORGANIZATION* 1 (Richard A. Falk & Wolfram F. Hanrieder eds., 1968).

Yale Law School that had assumed the mission of training domestic lawyers as policy makers, equipping them to play a far more active role in leading a great nation through the vicissitudes of the postwar world.¹⁴ As the Cold War began, McDougal and Lasswell found international lawyers similarly sidelined by the Political Realists' emphasis on "the importance of naked power."¹⁵ In response, they reinvented international jurisprudence, creating a comprehensive framework within which international lawyers, retrained as public policy experts, could use empirical data and theoretical insights from political science and a range of other disciplines to ascertain and critique existing law. This entire enterprise was in turn to be subordinate to the international lawyer's ultimate function of inventing and promoting better law, a world public order that would advance human dignity.¹⁶

For McDougal, law itself became a political process. Having thus dissolved the traditional law-politics distinction, he turned to a particular conception of the political process, that developed by Harold Lasswell. Lasswell defined politics as the adversarial process of decision about the distribution of values in society.¹⁷ McDougal and Lasswell then together defined law as the subset of this flow of decisions that could be said to be both "authoritative" and "effective." "Effective" means "controlling," thus introducing an element of power; "authorita-

¹⁴ This famous plan for the wholesale reconceptualization of American legal education was set forth in Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943). Lasswell was a professor of both law and political science at Yale Law School.

¹⁵ Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137, 157 (1953 I).

¹⁶ Most of McDougal's most important early work is collected in MYRES S. MCDUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* (1960), although in many ways McDougal's Hague lectures, *supra* note 15, provide more insight into the development of his unique framework. Other important articles, although only a limited selection from a vast corpus, include: Myres S. McDougal, *Law as a Process of Decision: A Policy-Oriented Approach to Legal Study*, 1 NAT. L. F. 53 (1956); Myres S. McDougal, *Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry*, 4 J. CONFLICT RESOL. 337 (1960); Myres S. McDougal & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967); Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968); Myres S. McDougal, *International Law and Social Science: A Mild Plea in Avoidance*, 66 AJIL 77 (1972); Myres S. McDougal & W. Michael Reisman, *International Law in Policy-Oriented Perspective*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 103 (Ronald St. J. Macdonald & Douglas M. Johnston eds., 1983) [hereinafter *Policy-Oriented Perspective*]. On the contributions of his many students, see the *Festschrift* published on the occasion of his retirement: *TOWARD WORLD ORDER AND HUMAN DIGNITY* (W. Michael Reisman & Burns H. Weston eds., 1976) [hereinafter *TOWARD WORLD ORDER*], also containing a complete bibliography of works by and relating to McDougal.

For those unwilling to struggle with the specialized vocabulary of McDougal-Lasswell-Reisman jurisprudence, Richard Falk has done an excellent job of translation and explication. See especially Richard A. Falk, Book Review, 8 NAT. L. F. 171 (1963) (reviewing MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961)); and FALK, *supra* note 13, App. C. An insightful account of McDougal's work with particular attention to its social science origins is Oran R. Young, *International Law and Social Science: The Contributions of Myres S. McDougal*, 66 AJIL 60 (1972).

¹⁷ Cf. Harold Lasswell's famous question: "Who gets what, when, how?" HAROLD D. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1936). The process is political because it inevitably involves power, both as a value in itself and as an instrument to attain other values. For a useful overview of Lasswell's scholarship and its relation to that of other "distributive" political theorists, see ORAN R. YOUNG, *SYSTEMS OF POLITICAL SCIENCE* 65-78 (1968). For the specific relationship between McDougal's theory of law and Lasswell's broader work, see Young, *supra* note 16, and, more recently, Gray L. Dorsey, *The McDougal-Lasswell Proposal to Build a World Public Order*, 82 AJIL 41 (1988).

tive” means in conformity with community values and expectations, as verified by the techniques of social science.¹⁸ Thus redefined as a flow of authoritative and effective decisions, law merges with the political and social processes that ultimately determine its content, yet retains a distinctive identity as law.¹⁹

In a genuine community bound together by common values, “the law” can be identified as the authoritative expression of those values. But in the international system, said McDougal, no such community of values exists. In such an arena, law shifts in function as well as form: “legal norms are understood to support the realization of values rather than the restraint of behavior.”²⁰ And if international law was an ideological battleground, international lawyers were on the front lines. McDougal, Lasswell and their associates²¹ exhorted international lawyers to use a range of policy skills to determine which law, or which system of laws, best furthers “human dignity,” and to distinguish such systems (public orders) from those that deny human dignity. After classifying the public orders in the world on the basis of these criteria, they proclaimed that the next step was to “invent and recommend” the principles and procedures necessary to a *world* public order consonant with the dignity and desires of all mankind.²²

Law as systemic policy science. Some of McDougal’s students—scholars such as Richard Falk, Saul Mendlovitz and Burns Weston—absorbed his conceptual medium without his substantive message. They recognized the importance of understanding law as the expression of social and political values but disagreed with McDougal’s rejection of the possibility of a community of values at the systemic level in an ideologically charged world. Falk, for instance, hailed the contribution made by the McDougal-Lasswell framework to contextualizing the law but ultimately found that it veered too far toward politics, opening the door to national opportunism, denying the possibility of legitimate pluralism, and encouraging adversary confrontation in the face of a fragile nuclear balance. He sought instead to strike his own balance between the pure autonomy of a Kelsen, on the one hand, and the tainted relevance of a McDougal, on the other.²³

¹⁸ The legal process itself is thus subject to restraints flowing from a modern version of natural law, “substitut[ing] the empirical generalizations of social science for the metaphysically based propositions of reason and religion.” Falk, Book Review, *supra* note 16, at 172.

¹⁹ For an accessible discussion of the McDougalites’ understanding of the relationship between authority and control, see Rosalyn Higgins, *Integration of Authority and Control: Trends in the Literature of International Law and International Relations*, in TOWARD WORLD ORDER, *supra* note 16, at 79.

²⁰ FALK, *supra* note 13, at 14.

²¹ McDougal has collaborated with many distinguished scholars, some of whom are listed as his associates in STUDIES IN WORLD PUBLIC ORDER, *supra* note 16. See also the contributors to TOWARD WORLD ORDER, *supra* note 16.

Although many of his students profited from his insights when turned to their own purposes, McDougal’s most prominent disciple and heir to his jurisprudential approach is W. Michael Reisman. See, e.g., W. Michael Reisman, *A Theory about Law from the Policy Perspective*, in LAW AND POLICY 75 (D. N. Weisstub ed., 1976), reprinted as abridged in MYRES S. MCDUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE I (1981); and the coauthored works cited in note 16 *supra*.

²² Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, in MCDUGAL & ASSOCIATES, *supra* note 16, at 39. World public order is defined as “those features of the world social process, including both goal values and implementing institutions, which are protected by law.” For McDougal and his associates, the supreme value to be promoted by international lawyers is the protection and furtherance of human dignity.

²³ FALK, *supra* note 13, at 41–49. An earlier version of this essay was published in THE RELEVANCE OF INTERNATIONAL LAW, *supra* note 1. Falk teaches in a political science department, and his ability to

Falk and his fellow participants in the World Order Models project thus developed their own response to the Realist challenge, compounding a distinctive mixture of Legal Realism and global idealism. They continued the McDougalite mission of studying and promoting law "from a policy perspective," but from the perspective less of human dignity than of systemic stability. In a nuclear world system, stability was a prerequisite for survival. Within this framework, law could be conceived either as rules or as process, either as an "international code of conduct" formulated in response to "the living needs of international society,"²⁴ or as a flow of authoritative and effective decisions made by a hypothetical "supranational" decision maker.²⁵ The result was the same, a transcendent order that served to "advance the values and interests of the overall world community rather than to promote the more special and diverse interests and values of national actors who are components of that system."²⁶ Law was thus redefined in relation to politics, but the politics in question flowed not from contending ideologies, but from an autonomous systemic logic.

Falk understood that adopting a "systemic orientation" meant setting up "an ideal form," but he concluded that it offered a better hope of international legal order than proposals for radical systemic change such as world government. The strength and relevance of such an order was enhanced by his de-emphasis of the constraint function of international law in favor of a host of other functions that international legal norms can and often do perform in international relations. These included: (1) the specification of "the constituents of minimum world order"—the basic rules of the international game that define the boundaries of acceptable action even when violated; (2) the provision of a process of communication in crisis through competing claims of right; (3) the underpinning of stable expectations for routine transactions by providing rules for "law-oriented bureaucracies" to follow; (4) the enabling of "cooperative regimes" in technical areas from telecommunications to health;²⁷ and (5) the positing of "criteria by which national governments and other actors can act reasonably, if so inclined."²⁸

In sum, the exponents of world order followed McDougal in conceding the constraint function of international law, thereby blunting the sharpest point of the Realist challenge. They accepted the need to tie law closely to the political interplay of power and interest. Yet within this framework they set out to show how international legal norms and rules perform functions that are indeed in the

bridge both disciplines, as well as his unparalleled capacity to digest and disseminate vast quantities of material, makes him an invaluable resource for anyone engaged in an interdisciplinary enterprise.

²⁴ FALK, *supra* note 13, at 49.

²⁵ *Id.* at 57.

²⁶ *Id.* at 18. Falk was influenced here by the development of systems approaches in international relations theory, discussed *infra*, which allowed him to conceptualize the operation of international law independently of state actors. Rosalyn Higgins later questioned whether systems theory could indeed be used "to identify universal values" distinct from the values of "sub-universal systems" such as "corporations, regions, organizations." Higgins, *supra* note 19, at 91.

²⁷ This function inspired an entire category of legal scholarship on "nonpolitical" international legal regimes that Falk has described elsewhere as "functionalism," analogous to the functionalism of David Mitrany. Scholars such as Percy Corbett, Wolfgang Friedmann, C. Wilfred Jenks and Julius Stone concentrated on the growth of law and legal organization in areas perceived as not of vital interest to nation-states, on the assumption that the growth of, and growing confidence in, these institutions would gradually feed the growth of law in areas of increasingly vital interest as well. See Richard A. Falk, *New Approaches to the Study of International Law*, 61 AJIL 477, 491-93 (1967); Higgins, *supra* note 19, at 89-90.

²⁸ FALK, *supra* note 13, at 52-59.

rational self-interest even of powerful actors interacting within a self-contained political system.²⁹

Pragmatism and legal process. McDougal understood international law as an integral part of ongoing political and social processes; Falk conceptualized international law in relation to those processes on a systemic level. Abram Chayes, Thomas Ehrlich and Andreas Lowenfeld also recast international law as process, but as “international *legal process*.”³⁰ In lieu of “the definition, elaboration and analysis of asserted rules or norms,” the study of international legal process concerns itself with the question: “How—and how far—do law, lawyers, and legal institutions operate to affect the course of international affairs?”³¹

In U.S. domestic law, the legal process school pioneered by Henry Hart, Albert Sachs and Herbert Wechsler was another response to Legal Realism, a response built on the idea that emphasis on the process and institutional place of legal decision making could maximize the democratic legitimacy of judicial lawmaking, if judicial lawmaking there must be.³² Attention to the details of legal process was thus intended and designed to constrain the autonomous power of lawyers and judges. In the international realm, by contrast, the purpose of the international legal process approach was, again, the prior aim of demonstrating that lawyers and legal norms had any impact at all on political processes. In direct response to Kennan’s charge, Chayes, Ehrlich and Lowenfeld affirmed: “In none of the problems presented in this book is law determinative of every issue. But in all of them law is relevant and the role of lawyers is important.”³³

A corollary to the international legal process approach is the collection of empirical evidence demonstrating the role of international law in specific international crises. Abram Chayes’s documentation of the way legal norms helped shape the decision-making process during the Cuban missile crisis is a classic of this genre, part of a series commissioned by the American Society of International Law to study the role of international law in international crises.³⁴ The animus of this series was to learn “not *how much* did law affect a given decision, but *how*. What are the different ways in which law and legal institutions affect what happens in international affairs?”³⁵

Chayes traced the functions of law as “constraint, justification, and organization” in one specific crisis.³⁶ Louis Henkin addressed this “how” question on a far

²⁹ The casebook produced by three leading members of this school, BURNS H. WESTON, RICHARD A. FALK & ANTHONY D’AMATO, *INTERNATIONAL LAW AND WORLD ORDER* (2d ed. 1990), seeks to introduce students to this insight by asking them to work through a wide range of international political problems so as to understand the role of law in their solution.

³⁰ CHAYES, EHRLICH & LOWENFELD, *supra* note 13.

³¹ *Id.* at xii. A more recent work in this vein is DANIEL G. PARTAN, *THE INTERNATIONAL LAW PROCESS* (1992).

³² For an excellent short overview of the sources and principal tenets of the legal process school, see Akhil R. Amar, *Law Story*, 102 HARV. L. REV. 688 (1989) (reviewing HART AND WECHSLER’S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (Paul M. Bator et al. eds., 1988)).

³³ CHAYES, EHRLICH & LOWENFELD, *supra* note 13, at xii.

³⁴ ABRAM CHAYES, *THE CUBAN MISSILE CRISIS* (1974). Other works in this series are THOMAS EHRLICH, *CYPRUS, 1958–1967* (1974); and ROGER FISHER, *POINTS OF CHOICE* (1978).

³⁵ Roger Fisher, *Foreword to CHAYES, supra* note 34, at v. Fisher chaired a panel of ASIL members involved in the series.

³⁶ Chayes later applied his method to the workings of arms control agreements, concluding that the standard “rational actor” approach employed in strategic theory overlooked the importance of “consensus, concession, and commitment” on the part of a multitude of bureaucratic actors involved in the negotiation and ratification of a treaty as forces for compliance. Chayes also argued that legal

broader scale, in the one book on international law virtually all political scientists have read. *How Nations Behave* proceeds from the now-familiar proposition that international law remains condemned “constantly [to] defend its existence” and “[e]ven more earnestly . . . its relevance to world events.”³⁷ Henkin sought to convince the Realists that “law is a major force in world affairs,” while persuading international lawyers to “think beyond the substantive rules of law to the function of law, the nature of its influence, the opportunities it offers, the limitations it imposes.”³⁸ Law provides the “submerged” rules of international relations, the definition of a state and the provision of the instruments of its interaction and communication with other states;³⁹ it establishes “common standards where they seem desirable”;⁴⁰ customary law and international agreements “avoid the need for negotiating anew in every new instance”;⁴¹ and both “create justified expectation[,] warrant confidence as to how others will behave”⁴² and facilitate cooperation in the pursuit of common interests.⁴³

This pragmatic approach, examining law as nations see it rather than as scholars understand and reimagine it,⁴⁴ is the strategy recommended by Francis Boyle to overcome Realist skepticism.⁴⁵ Boyle, an international lawyer also trained as a political scientist, understands the evidentiary hurdle that must be surmounted if this approach is to be effective. “Relevance,” for Political Realists, means causal relevance to how nations behave. It means a demonstration that international legal rules provide incentives or constraints capable of producing outcomes significantly *different from* those that a pure power theory would predict. Boyle outlines a detailed protocol to meet these standards.

The Political Response: Refining and Modifying Realism

Although it may have been dominant, Morgenthau Realism was hardly the last word in political science. Subsequent international relations theorists sought to refine Realism as a theory of international politics. Some of these theorists also returned to asking how law could be accommodated within the framework of power politics. Specifically, the question animating political scientists interested in international law in the 1960s was how the dramatic postwar changes in the

provisions designed to require the furnishing of information on demand, now known as “transparency” provisions, could play as important a role in compliance as the standard model of verification and sanctions in noncompliance. Abram Chayes, *An Inquiry into the Workings of Arms Control Agreements*, 85 HARV. L. REV. 905, 934, 954–55 (1972).

³⁷ HENKIN, *supra* note 4, at ix (preface to 1st ed. 1968, reprinted in 2d ed. 1979). Part 4, entitled “The Law in Operation,” specifically examines the role of law in foreign-policy decision making in four case studies: Suez, the Eichmann abduction, the Cuban missile crisis and Vietnam. The rest of the book explores the role and functions of law in a broader frame. *See also* Louis Henkin, *International Organization and the Rule of Law*, 23 INT’L ORG. 656 (1969) (describing how international organizations contribute to international lawmaking, influence the disposition of states to comply with their international commitments, and conform to the interests of the United States).

³⁸ HENKIN, *supra* note 4, at 4–5. Henkin, too, felt compelled to rebut Kennan’s charge of the irrelevance and unsuitability of international law. *See id.* at 322–29.

³⁹ *Id.* at 21.

⁴⁰ *Id.* at 29.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 20.

⁴⁴ This is Henkin’s criticism of the McDougal school, a view of law “not as is but always as becoming” from some Archimedean perspective. *Id.* at 40; *see also* Louis Henkin, *Force, Intervention, and Neutrality in Contemporary International Law*, 57 ASIL PROC. 147, 168 (1963).

⁴⁵ BOYLE, *supra* note 6.

international political system had changed the nature and potential effectiveness of international legal norms. A decade later, norms were once again read out of the equation with the introduction of "Structural Realism" or "Neo-Realism." Yet this last swing of the pendulum generated its own strong response, culminating in the modification of Realism on its own terms and the reestablishment of a strong theoretical argument for the function and effectiveness of international law.

Systematizing the international system. While lawyers were trying to demonstrate the relevance of law to the shaping of politics, several prominent international relations theorists undertook to determine the impact of politics on law. Stanley Hoffmann was originally trained as an international lawyer; Morton Kaplan collaborated with Nicholas Katzenbach, a recognized scholar in private international law.⁴⁶ Both Hoffmann and Kaplan were early "systems theorists," scholars who sought to apply the insights of domestic systems theory to international politics.⁴⁷ Once they had conceptualized state interaction over time in terms of a typology of "international systems," the question became how the distinctive characteristics of different systems found expression in international law.⁴⁸ They regarded the international law of a particular era as both a reflection of the reigning political system and a repository of normative efforts to regulate and shape it.⁴⁹ An understanding of this interrelationship was crucial to any analysis of the potential effectiveness of those norms.

Hoffmann analyzed and compared the relationships between international law and world politics in three historical political systems: the balance of power system from the Peace of Westphalia to the French Revolution, the century balance of power system, and "the present revolutionary system."⁵⁰ Kaplan took a more

⁴⁶ Stanley Hoffmann, *International Systems and International Law*, in *THE INTERNATIONAL SYSTEM* 205 (Klaus Knorr & Sydney Verba eds., 1961), reprinted in *INTERNATIONAL LAW AND ORGANIZATION*, *supra* note 13, at 89 (all citations herein are to the latter version); MORTON A. KAPLAN & NICHOLAS KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* (1961). Other important systems theorists include RICHARD N. ROSECRANCE, *ACTION AND REACTION IN WORLD POLITICS* (1963), who distinguished nine separate historical systems, and Oran Young. As discussed above, Richard Falk also drew on the insights of systems theory, but as a means of conceptualizing an *international legal system*.

⁴⁷ This effort was part of the ongoing struggle to define international relations as an "autonomous discipline." On the relationship between this effort and the conceptualization of international politics as constituting part of a distinct system, see *CONTEMPORARY THEORY IN INTERNATIONAL RELATIONS* 1-3 (Stanley Hoffmann ed., 1960).

For a brief, but useful, overview of the evolution of systems theory from the behavioral sciences, sociology, and cybernetics to domestic and, finally, international political science, see *CONTENDING THEORIES OF INTERNATIONAL RELATIONS* 102-37 (James E. Dougherty & Robert L. Pfaltzgraff eds., 1st ed. 1971). A more sophisticated review is YOUNG, *supra* note 17. For a particularly thoughtful effort to describe what a developed systems theory might look like, see ORAN R. YOUNG, *A SYSTEMIC APPROACH TO INTERNATIONAL POLITICS* (Princeton Research Monograph No. 33, 1968), which also features an exhaustive bibliography of systems literature.

⁴⁸ Each systems theorist uses a slightly different definition of "system," but all agree that the analytic concept of a system requires study of the *interaction* of states with one another within a particular structure and in accordance with established patterns of behavior.

⁴⁹ A quite different "systems approach" was that of political scientist William Coplin, *supra* note 13, who argued that international law should be thought of as a system of authoritative communication, particularly communication to actors within the system about the nature and structure of the system. Coplin's analogy between this function of international law and the function of domestic law in socialization processes bears striking resemblance to the arguments advanced a decade later by critical legal theorists in both domestic and international law.

⁵⁰ Hoffmann, *supra* note 46, at 107.

abstract approach, constructing six models of hypothetical international systems.⁵¹ He and Katzenbach integrated this approach with McDougal-Lasswell jurisprudence, analyzing international legal norms as related to and constrained by the underlying institutions, values and interests in the political system they purport to govern. They sought particularly to explicate the differences between the international law of the nineteenth-century balance of power system and that of the contemporary "loose bipolar" system.⁵²

These proponents of systems theory met the Realist challenge from within political science by articulating at least a potential role for international law. For international lawyers of the era, however, seeking to evaluate current prospects for practicing their trade, the results were decidedly mixed. From Hoffmann's point of view, the prospects for international law were dim as long as the current "revolutionary" system precluded any genuine political consensus or community of interests necessary to ensure at least minimum compliance with the rules of the game.⁵³ Kaplan and Katzenbach were considerably more positive, finding that "the United States and the Soviet Union have a joint interest in maintaining those minimal normative standards that permit each to live tolerably in a world in which the other is powerful."⁵⁴ Yet they also admitted that "more than one normative structure may be consistent with the present facts of international politics."⁵⁵

From the perspective of traditional international lawyers, law conditioned on the polarities of power and any number of other political, economic and social variables was distressingly indeterminate;⁵⁶ moreover, "minimal normative standards" were a far cry from the carefully drawn rules of the Charter. It would have been reasonable to conclude that the effort to uncover the political roots of

⁵¹ MORTON A. KAPLAN, *SYSTEM AND PROCESS IN INTERNATIONAL POLITICS* (1962).

⁵² In contrast to this deliberate application of McDougal's principles, Hoffmann explicitly distanced himself from "deniers or cynics" "disguised as 'policy-oriented' theorists who dissolve rules and principles into a maze of processes, messages, and alternatives." Hoffmann, *supra* note 46, at 116. Yet a number of his conclusions strikingly accord with McDougal's analysis, notably his claim that in revolutionary systems, "gaps and ambiguities [in the law] become wedges for destruction or subversion of the international order in the interest of any of the actors." *Id.* at 98. This argument echoes McDougal's pleas for the avoidance of a "false universalism" in a system in which states with very different values can exploit ambiguities to their own advantage. The difference between the two thinkers is that Hoffmann saw these difficulties as limiting the relevance and usefulness of international law in certain political circumstances; McDougal sought to *use* the law to help change these political circumstances. See Stanley Hoffmann, *International Law and the Control of Force*, in *THE RELEVANCE OF INTERNATIONAL LAW*, *supra* note 1, at 21 [hereinafter *Control of Force*].

⁵³ See Hoffmann, *Control of Force*, *supra* note 52. As Hoffmann explained, his analysis led him to the regretful conclusion that "the plight of international law in the present international milieu is particularly serious," and that "the relevance of legal rules to the control of the use of force among states will . . . remain limited in the near future." *Id.* at 21. Contrary to the suggestion of some of his critics in the international legal community, however, he did not abandon hope for a future international legal order or advocate passivity until the system changed. He argued, instead, for pursuing the development of international law in areas other than the control of force, and in that area to develop practices that might operate as "quasi-law." *Id.* at 45.

⁵⁴ KAPLAN & KATZENBACH, *supra* note 46, at 348. This approach earned Falk's praise for using systems analysis to make a case for the value and potential effectiveness of international norms. FALK, *supra* note 13, at 486-87. Another international relations theorist, writing roughly contemporaneously with Kaplan and Katzenbach, who reached similar conclusions from staunchly Realist premises is JOHN H. HERZ, *INTERNATIONAL POLITICS IN THE ATOMIC AGE* (1959).

⁵⁵ KAPLAN & KATZENBACH, *supra* note 46, at 351.

⁵⁶ Even McDougal reached this conclusion, notwithstanding Kaplan and Katzenbach's acknowledged debt to his conceptual apparatus and professed efforts to apply it. See McDougal & Reisman, *Policy-Oriented Perspective*, *supra* note 16, at 112.

positive law undermined the autonomous legal foundations of normative law. In retrospect, however, such approaches were the high-water mark in interdisciplinary conceptions of international law and politics, at least until the early 1980s. The new generation of systems theorists proved far less congenial to international law.

Kenneth Waltz, one of the most influential international relations theorists of the 1980s, first distinguished among individual, unit-level and systemic levels of analysis in *Man, the State and War*, published in 1958. Over the next twenty years, he crafted a powerful and precise critique and redefinition of systems theory, redefining Political Realism in the process.⁵⁷ Waltz attacked earlier theorists such as Hoffmann and Kaplan for completely confusing “unit-level” with true systemic explanations. Their “systems” were no more than the sum total of the motives and actions of the actors within them. A true systemic explanation, by contrast, relies on the “structure” within which those actors act. It assumes that structural elements dictate channels of actor interaction and ultimately determine the outcomes of that interaction. The components of that structure, in turn, are threefold: an ordering principle, the differentiation and functional specification of the units, and the distribution of capabilities across units.

A comprehensive description of Waltz’s theory, variously known as “Structural Realism” or “Neo-Realism,” is beyond the scope of this article. The key point here is that from an international lawyer’s perspective, his vision of the international system is extremely narrow. Unlike the structure of domestic political systems, Waltz argued, the structure of the *international* political system contains only two of the three potential components: anarchy (the ordering principle) and the number of great powers within the system (the distribution of capabilities across units). From this “positional picture” could the basic laws of international politics be deduced.⁵⁸ Whereas the missing component (the differentiation and functional specification of the units) permits some role for law in domestic political systems, its absence from Waltz’s conception of the international system affords no comparable role for international law.

Waltz’s was a brilliant and lasting achievement. In a discipline hungry for the theoretical apparatus that accompanies self-definition, he systematized the international system. But he left no room whatsoever for international law. If the earlier systems theorists had understood international legal norms to be inevitably conditioned and ultimately constrained by politics, they at least recognized international law as an autonomous variable in the international system, of differing strength under specified conditions. For Waltz, norms of any sort, qua norms, lacked independent causal force.

Modifying Structural Realism. Ironically, help came from a camp of political scientists, scholars who had been explicitly distancing themselves further and further from anything called “law” for twenty years. These were the students of international organization, or, more broadly, “international governance,” defined as “the coordination of group activities so as to conduct the public business . . . consistent with national sovereignty.”⁵⁹ As chronicled by Friedrich Kratochwil and John Ruggie in an insightful review of the field since its inception in the interwar period, the scholarly focus in this area shifted from a preoccupa-

⁵⁷ KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979).

⁵⁸ *Id.* at 99.

⁵⁹ Friedrich Kratochwil & John G. Ruggie, *International organization: a state of the art on an art of the state*, 40 INT’L ORG. 753, 754 (1986).

tion with formal institutions, to an emphasis on institutional processes, to a more general inquiry into how international organizations work in a larger process of international governance. The last step in this progression was the reconceptualization of the entire field of international organization as the study of "international regimes," defined as the "principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area."⁶⁰

This trajectory rescued the field of international organization from "irrelevance, if not obscurity,"⁶¹ transforming it into one of the most vibrant and exciting areas of general international relations theory. By the late 1970s and early 1980s, the regime theorists were willing to challenge the Realists directly. The problem was how to explain the continued existence and relative strength of international institutions following the perceived decline of American hegemony.⁶² Realists, both traditional and structural, had explained the existence of these institutions as a corollary of dominant U.S. power, and now had to argue either that U.S. power was not declining or that institutions from the General Agreement on Tariffs and Trade to the International Monetary Fund were suddenly tottering.

The alternative explanation favored by the regime theorists was that these institutions served a valuable purpose in their own right. The majority subgroup of these theorists, dubbed "modified structural realists," developed a theory of regimes that proceeded explicitly from neo-Realist premises, accepting the standard assumption of states as rational egoists and acknowledging the primary importance of the structure of the international system as a determinant of state behavior.⁶³ Robert Keohane took this approach one step further. Drawing on rational-choice techniques from the same microeconomics literature venerated by Waltz, he elaborated a "functional" theory of regimes that explains their pervasiveness and persistence in international politics as a result of rational calculations by participating states.

In *After Hegemony*, Keohane argues that international regimes

enhance the likelihood of cooperation by reducing the costs of making transactions that are consistent with the principles of the regime. They create the

⁶⁰ Kratochwil and Ruggie trace every step of this progression with copious citations, and follow up with a critique of current trends in regime theory. For anyone interested in political science writing on international organization generally and regime theory in particular, this is necessary reading, as is the 1982 special issue of *International Organization* on international regimes, republished as INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983). Krasner's introduction provides an overview of the various approaches to regimes encompassed in the volume, ranging from Structural Realist skepticism to what he terms a "Grotian" position, advanced by Oran Young and Hopkins and Puchala, who regard regimes as the model status of international life. In between is the majority position in the volume, exemplified by the contributions of Robert Keohane and Arthur Stein, who proceed from Structural Realist premises but argue that regimes can maximize cooperation under specified conditions. Stephen D. Krasner, *Structural causes and regime consequences: regimes as intervening variables*, in *id.* at 1.

Two excellent reviews of the literature since then are Stephan Haggard & Beth A. Simmons, *Theories of International Regimes*, 41 INT'L ORG. 491 (1987); and Oran R. Young, *International Regimes: Toward a New Theory of Institutions*, 39 WORLD POL. 104 (1986). A valuable overview of the basic concepts of regime theory written especially for international lawyers is Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989).

The definition of regimes in the text is in Krasner, *supra*, at 2.

⁶¹ Kratochwil & Ruggie, *supra* note 59, at 753.

⁶² See Krasner, *supra* note 60; and ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 8-10 (1984).

⁶³ See Krasner, *supra* note 60. See also discussion *supra* note 60.

conditions for orderly multilateral negotiations, legitimate and delegitimate different types of state action, and facilitate linkages among issues within regimes and between regimes. They increase the symmetry and improve the quality of the information that governments receive.⁶⁴

International regimes also enhance compliance with international agreements in a variety of ways, from reducing incentives to cheat and enhancing the value of reputation, to “establishing legitimate standards of behavior for states to follow” and facilitating monitoring, which creates “the basis for decentralized enforcement founded on the principle of reciprocity.”⁶⁵

This “functionalist” or, as it would later come to be known, “rationalist” view of regimes has provided a tool for the study of international cooperation that extends beyond the traditional “low politics” of international political economy, long thought a more fertile area for cooperative action than the “high politics” of security studies, where most Realists were concentrated.⁶⁶ As a group of international political economists and security scholars subsequently demonstrated, the approach was equally applicable to explaining cooperation under conditions of conflict.⁶⁷ Here the regime theorists were challenging the neo-Realists on their own ground.⁶⁸ And indeed, taken as a whole, Keohane’s brand of regime theory constitutes not only a modification of Structural Realism, but also a critique, arguing that information must be added to power on the list of systemic variables.⁶⁹ Institutions that provide valuable information must thus be factored into systemic explanations of state behavior independently of structure.⁷⁰

Rediscovering international law (and refusing to recognize it). Keohane is careful to distinguish these functions of regimes from world government, or even “centralized quasi-governments.”⁷¹ Rejecting a view of institutions based on “‘peace through law’ or world government,” he argues that “institutions that facilitate cooperation do not mandate what governments must do; rather, they help governments pursue their own interests through cooperation.”⁷² In a word, institutions “empower governments rather than shackling them.”⁷³

This was an insight new only to political scientists.⁷⁴ As discussed above, international lawyers had spent the previous three decades defining international law as something *other* than an Austinian constraint system. “World government” was international legal scholarship circa 1960, when scholars such as Inis Claude warned international lawyers to focus more on the “peace among groups” aspect

⁶⁴ KEOHANE, *supra* note 62, at 244. See also ORAN R. YOUNG, *INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT* (1989).

⁶⁵ KEOHANE, *supra* note 62, at 244–45.

⁶⁶ For elaboration on this point, see Kratochwil & Ruggie, *supra* note 59, at 762.

⁶⁷ See Robert Jervis, *Security Regimes*, in *INTERNATIONAL REGIMES*, *supra* note 60, at 173; *COOPERATION UNDER ANARCHY* (Kenneth A. Oye ed., 1986).

⁶⁸ For a collection of critiques of Neo-Realism, see *NEO-REALISM AND ITS CRITICS* (Robert O. Keohane ed., 1986).

⁶⁹ KEOHANE, *supra* note 62, at 14, 245.

⁷⁰ This was the “modification” of Structural Realism. Keohane also criticized the neo-Realists for relying too heavily on systemic approaches, arguing that, although valuable as a “first cut,” such approaches must ultimately be supplemented by “unit-level” explanations drawn from domestic politics.

⁷¹ KEOHANE, *supra* note 62, at 244.

⁷² *Id.* at 246.

⁷³ *Id.* at 13.

⁷⁴ In an extensive bibliography, Keohane lists only one international law source, Henkin’s *How Nations Behave*, which he cites for the proposition that regimes are fragmentary, and for “go[ing] so far as to say that ‘almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.’” *Id.* at 88, 98 (quoting HENKIN, *supra* note 4, at 47).

TABLE 1

INTERNATIONAL NORMS AND INSTITUTIONS FROM THE PERSPECTIVE OF REGIME THEORISTS AND INTERNATIONAL LAWYERS

Functions and Benefits of International Regimes	Functions and Benefits of International Law
lowering transaction costs	providing rules of the game; fostering stable expectations (Falk, Henkin, Chayes)
creating conditions for orderly multilateral negotiations	establishing efficient baselines: avoiding the need for constant renegotiation and establishing common standards where they seem desirable (Henkin)
legitimizing and delegitimizing types of state action	positing criteria by which national governments and others can act reasonably and justify their action (Falk, Chayes) providing a process of communication in crisis (Falk)
increasing symmetry and improving quality of information	creating opportunities for intermeshing of national and international bureaucracies (Falk)
facilitating linkages	
enhancing compliance by creating conditions for decentralized enforcement: monitoring enhancing value of reputation establishing legitimate standards of behavior	enhancing compliance by embedding international agreements in domestic political and bureaucratic processes, improving transparency and fostering routinized "habits of compliance" (Chayes, Henkin)

of domestic legal structure.⁷⁵ Keohane followed this advice, but so had the audience for which it was intended. The international lawyers discussed above, among others, had spent two decades emphasizing the *facilitative* properties of international law. A comparison of a prototypical "functionalist" regime theorist's list of the attributes of international regimes with a summary of the functions and uses of international law, as identified by various international lawyers, is instructive (see table 1 above).

The overlap is not complete, the language and focus often still divergent. Nevertheless, the overall message is clear. Political scientists have rediscovered international law, explaining its function and value to their fellow scholars in terms very similar to those long used by international lawyers.

II. THE FRUITS OF CONVERGENCE: THE INSTITUTIONALIST AGENDA

Although frustrating to many international lawyers, the early regime theorists' insistence on deriving a theory of international institutions from Realist premises was a clever strategic move within political science. Reinventing international law in rational-choice language stopped the traditional "Realist-Idealist" debate cold. "Efficiency and transparency" are hardly legalist-moralist sentiments. They are the language of rational calculation, effective not only with political science Realists but also with a large and growing number of international lawyers' domestic colleagues.

⁷⁵ INIS L. CLAUDE, *POWER AND INTERNATIONAL RELATIONS* 255-71 (1962).

Further, modified Structural Realism added a valuable precision to the more general formulations of the “functions” of international law developed by international lawyers. While international lawyers may complain that regime theorists are simply restating the obvious—that international legal rules, norms and decision-making procedures facilitate cooperation—regime theorists may legitimately respond that international lawyers have been all too willing to accept this premise as an article of faith rather than as a theoretically deducible and empirically verifiable phenomenon. As noted, the overlap between the two sides of table 1 is not complete: regime theorists have elaborated much more detailed theories about the value of information to international cooperation and the ways that institutionalization shapes multilateral negotiations. Finally, the development of a “theory” of regimes permits regime theorists to predict “the demand” for international regimes, and thus the relative strength of different regimes according to fluctuations in the underlying demand.⁷⁶

In the end, disciplinary one-upmanship must remain secondary to the central point: even without coercion and thus the requirement of central enforcement, legal rules and decision-making procedures can be used to structure international politics.⁷⁷ Regime theorists have elucidated this process in ways both familiar and unfamiliar to international lawyers. More important, however, they have reached a point where they are likely to be far more receptive to the lessons international lawyers can teach them about the functions of international law, particularly regarding the international legal emphasis on the role of law in providing focal points for the crystallization and stabilization of expectations.⁷⁸

As the regime theorists won adherents, they differentiated themselves further from Realism, in both its classic and structural varieties. Keohane recast modified Structural Realism as “Neoliberal Institutionalism,” a theoretical approach that begins by recognizing “the fact that world politics at any given time is to some extent institutionalized,” both through “[f]ormal international organizations and codified rules and norms (‘international regimes’)” and through less-formalized patterns of behavior “recognized by participants as reflecting established rules, norms, and conventions.”⁷⁹ Briefly, Neo-Liberal Institutionalism asserts “that con-

⁷⁶ See, e.g., Robert O. Keohane, *The Demand for International Regimes*, in *INTERNATIONAL REGIMES*, *supra* note 60, at 141.

⁷⁷ This is the role that even Kenneth Waltz attributes to law in the domestic setting. Waltz analogizes the international system to a domestic market, in which the constituent units are governed by the law of unintended consequences and thus can be analyzed independently of their actual intentions. He claims that the analogy ends, however, because domestic markets are structured by laws channeling individual interests into productive uses, such as electoral laws, securities and banking regulation, antitrust laws, etc. WALTZ, *supra* note 57, at 91. In his words:

To say that the two realms are structurally similar is not to proclaim their identity. Economically, the self-help principle applies within governmentally contrived limits. Market economies are hedged about in ways that channel energies constructively. One may think of pure food-and-drug standards, antitrust laws, securities and exchange regulations, laws against shooting a competitor, and rules forbidding false claims in advertising. International politics is more nearly a realm in which anything goes. International politics is structurally similar to a market economy insofar as the self-help principle is allowed to operate in the latter.

Id.

⁷⁸ See Geoffrey Garrett & Barry R. Weingast, *Ideas, Interests and Institutions: Constructing the EC's Internal Market*, in *IDEAS AND FOREIGN POLICY* (Judith Goldstein & Robert O. Keohane eds., forthcoming 1993).

⁷⁹ ROBERT O. KEOHANE, *INTERNATIONAL INSTITUTIONS AND STATE POWER* at vii (1989). This volume is a collection of Keohane's essays on institutions through the 1980s. For those seeking to find

ventions in world politics are as fundamental as the distribution of capabilities among states.”⁸⁰ Thus formulated, Neo-Liberal Institutionalism stands more for a set of questions than for any particular answers, and offers a strong generic framework for any number of collaborative enterprises between international lawyers and political scientists.⁸¹

These opportunities for interdisciplinary collaboration expand even further when Keohane’s “rationalist” critique of Neo-Realism is supplemented by an emerging “reflectivist” or “constructivist” critique. This approach focuses even more explicitly on the role of international legal norms in shaping state behavior. It forsakes rational-choice analysis for an exploration of the “intersubjective” quality of regimes and the auto-construction of both identities and interests.⁸² It correspondingly focuses on the power of process and institutions to *transform* the self-perceptions of participants, and thus to reshape their calculation of interests. From this perspective, a shared understanding of international law as law is integral to its effectiveness.

Components of an Institutional Interdisciplinary Dialogue

Valuable lines of inquiry within Institutionalism include the following, all of which currently engage international lawyers and political scientists who are working along very similar lines and who could usefully participate in direct interdisciplinary debate.

Distinguishing legal regimes from nonlegal regimes. As international lawyers will not need to be reminded, Keohane’s catholic definition of “international institutions” seems to track the customary and conventional sources of international law.⁸³ Yet the concept of international institutions is clearly broader than that of international law. A new question on the agenda thus concerns the difference between “legal” regimes and other regimes and their differential impact on state

their way through the bewildering maze of theoretical labels, the introductory essay offers a useful overview of the distinctions among Neo-Liberal Institutionalism, Neo-Realism, and Liberalism. However, Keohane’s summation of the Liberal tradition differs considerably from the Liberal paradigm described in the second half of this article. He defines Liberalism “as a set of guiding principles for contemporary social science.” Yet his preferred subset of these principles closely resembles Institutionalism. Thus, “Neoliberal institutionalists accept a version of liberal principles that . . . emphasizes the pervasive significance of international institutions without denigrating the role of state power.” *Id.* at 11.

⁸⁰ *Id.* at 8.

⁸¹ For an even more comprehensive approach to international relations theory that accords international law and institutions a central role, see Charles Lipson, *The Centrality of Contract in International Relations* (paper presented at Annual Meeting of the American Political Science Association, Chicago, IL, September 1992). Lipson advocates reconceptualizing all problems of international politics as “problems of contract.”

⁸² Kratochwil and Ruggie advocate this approach in the conclusion to their survey, pointing out that a definition of regimes that includes the element of convergent expectations necessarily has an intersubjective dimension. Kratochwil & Ruggie, *supra* note 59, at 763–71. See also FRIEDRICH KRATOCHWIL, *RULES, NORMS, AND DECISIONS* (1989); NICHOLAS G. ONUF, *WORLD OF OUR MAKING: RULES AND RULE IN SOCIAL THEORY AND INTERNATIONAL RELATIONS* (1989); Alexander Wendt, *Anarchy is What States Make of It*, 46 INT’L ORG. 391 (1992). The “rationalist/reflectivist” dichotomy was coined by Keohane in his 1988 presidential address to the International Studies Association. Robert O. Keohane, *International Institutions: Two Approaches*, 32 INT’L STUD. Q. 379 (1988).

⁸³ Cf. INTERNATIONAL COURT OF JUSTICE, STATUTE Art. 38 (instructing the Court to apply “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states” and “international custom, as evidence of a general practice accepted as law”).

behavior.⁸⁴ In remarks at the 1992 Annual Meeting of the American Society of International Law, Oran Young proposes a collaborative focus on several issues of mutual interest to political scientists and international lawyers.⁸⁵ One of the functional distinctions he proposes intersects recent work in both political science and law on the uses of “soft law” or informal agreements.⁸⁶ Yet he also emphasizes more traditional jurisprudential distinctions based on the source of legal obligation and, in particular, the distinctive nature of legal reasoning.⁸⁷ This latter line of inquiry might draw on the insights of recent critical scholarship.⁸⁸

Organizational design. Another important area of potential collaboration is the question of organizational design, a subject targeted by Kratochwil and Ruggie as a way to bring the theory of international relations back to the practice of international organizations.⁸⁹ Enhancing our understanding of how different institutions can best perform a range of international problems is of equal interest to political scientists and lawyers.⁹⁰ Further, the “reflectivist” or intersubjective emphasis on the ways that organizations fulfill requirements of *transparency* and *legitimation* directly coincides with several important streams of international legal scholarship.⁹¹

Compliance. Many important studies of the phenomenon of compliance with international agreements are currently under way. Abram and Antonia Chayes have argued for decades that treaty “compliance” provisions are more effective at

⁸⁴ Keohane, following Haggard and Simmons, now limits the definition of regimes to “institutions with explicit rules, negotiated by states.” KEOHANE, *supra* note 79, at 4, 17 n.5 (1989). It seems safe to assume that this definition of regimes will be virtually coextensive with Young’s category of “legal regimes.”

⁸⁵ Oran R. Young, Remarks, 86 ASIL PROC. 172 (1992). On the same panel, Kenneth Abbott went so far as to call for a new joint discipline, possibly called “the study of organized international cooperation,” to take full advantage of shared understandings between international relations and international law. Kenneth W. Abbott, *Elements of a Joint Discipline*, *id.* at 167, 168.

Keohane has also called for further inquiry into the distinctions among different types of international institutions: formal organizations, regimes, and informal institutions or practices. KEOHANE, *supra* note 79, at 13–14. He explicitly poses the question whether “alliances ever develop norms that are not subject to calculations of interest, and that are therefore genuine normative commitments for participants.” *Id.* at 15.

⁸⁶ Examples of legal writing on this issue include Anthony D’Amato, *What ‘Counts’ As Law?, in LAWMAKING IN THE GLOBAL COMMUNITY* 83 (Nicholas G. Onuf ed., 1982); and Peter S. Thacher, *Alternative Legal and Institutional Approaches to Global Change*, 1 COLO. J. INT’L ENVTL. L. & POL’Y 101 (1990). The most sophisticated treatment of this subject in political science is Charles Lipson, *Why are some international agreements informal?*, 45 INT’L ORG. 495 (1991).

⁸⁷ Young’s arguments here track those of Friedrich Kratochwil. See KRATOCHWIL, *supra* note 82.

⁸⁸ See, e.g., Kennedy, *supra* note 12; MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989).

⁸⁹ Kratochwil & Ruggie, *supra* note 59, at 772–73.

⁹⁰ A recent paper by Kenneth Abbott offers an exemplar of this approach, using an interdisciplinary framework to investigate the “rational design hypothesis” with respect to provisions governing the production of information in arms control agreements. Kenneth W. Abbott, *The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT’L L.J. 701 (1993). See also Lipson, *supra* note 86.

⁹¹ On transparency, see the work of Abram and Antonia Chayes outlining a noncriminal model of compliance that specifically addresses questions of organizational design. Abram Chayes & Antonia H. Chayes, *Regime Architecture—Elements and Principles* (Brookings Institution ed. volume, forthcoming 1993); see also Abram Chayes & Antonia H. Chayes, *On Compliance*, INT’L ORG. (forthcoming 1993). On the “compliance pull” of legitimacy, and for a serious effort to specify the content and dimensions of legitimacy, see THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

specifying venues and structuring processes for dispute resolution than at “enforcing” compliance.⁹² A group of younger scholars have used regime theory to conceptualize and measure compliance with international human rights regimes,⁹³ arms control treaties⁹⁴ and regimes governing the use of force.⁹⁵ On the political science side, Robert Keohane complements this insight by showing how rational state actors have plenty of incentives to agree to such provisions at the outset.⁹⁶ By drawing on insights and perspectives from scholars in both fields, it should be possible to formulate a set of questions to which both sides can contribute factual information and theoretical insight. The results of inquiries from both perspectives could then be synthesized in a common framework that would highlight the overlap of both disciplines and the comparative advantage of each.

International ethics. The final candidate in this brief and admittedly partial list is a renewed focus on direct normative inquiry in international politics. International ethics is an obvious area of overlap for international political theorists and international lawyers, but one that has suffered a fate similar to that of international law in international relations theory.⁹⁷ One way to strengthen this subfield is to argue *against* the uniqueness of the international realm, which would open the door to applying the same moral criteria to international political arrangements as to domestic political arrangements.⁹⁸

⁹² See Chayes & Chayes, *Regime Architecture*, *supra* note 91. Other interesting interdisciplinary work on compliance includes J. H. Ausubel & D. G. Victor, *Verification of International Environmental Agreements*, 17 ANN. REV. ENERGY & ENV'T 1 (1992); RONALD B. MITCHELL, FROM PAPER TO PRACTICE: IMPROVING ENVIRONMENTAL TREATY COMPLIANCE (1992); GLOBAL ENVIRONMENTAL CHANGE: UNDERSTANDING THE HUMAN DIMENSIONS (Paul C. Stern et al. eds., 1992); OLAN R. YOUNG, COMPLIANCE AND PUBLIC AUTHORITY: A THEORY OF INTERNATIONAL APPLICATIONS (1979); ROBERT O. KEOHANE, SOVEREIGNTY, INTERDEPENDENCE AND INTERNATIONAL INSTITUTIONS (1991); Robert O. Keohane, *Compliance with International Commitments: Politics within a Framework of Law*, 86 ASIL PROC. 176 (1992).

⁹³ Diane F. Orentlicher, *The Power of an Idea: The Impact of United States Human Rights Policy*, 1 TRANSNAT'L L. & CONTEMP. PROBS. 43 (1991) (uses regime theory to develop a model of the effectiveness of international human rights law, placing “norm-generating and compliance-directed activities” “along a spectrum of regime activities, ranging from weak to comparatively strong measures of promoting certain behavior”; *id.* at 64).

⁹⁴ Edwin M. Smith, *Understanding Dynamic Obligations: Arms Control Agreements*, 64 S. CAL. L. REV. 1549 (1991) (connects regime theory with relational contract literature to conceptualize and interpret a new class of international obligations that are defined within the context of a formal international agreement but that cannot be defined at the time the agreement is executed).

⁹⁵ Francis A. Boyle, *International Law and the Use of Force: Beyond Regime Theory*, in IDEAS AND IDEALS: ESSAYS ON POLITICS IN HONOR OF STANLEY HOFFMANN (forthcoming 1993).

⁹⁶ Robert O. Keohane, U.S. Compliance with Commitments: Reciprocity and Institutional Enmeshment (paper presented at Program on International Politics, Economics, and Security (PIPES), University of Chicago, Oct. 24, 1991).

⁹⁷ Notable exceptions include STANLEY HOFFMANN, DUTIES BEYOND BORDERS (1981); and CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1979). Michael Doyle is currently working on a major project seeking to reconnect Kant's political and moral theories.

⁹⁸ Lea Brilmayer is pioneering this effort, arguing first that governmental treatment of foreigners should be subject to the same moral and political criteria as the treatment of citizens, and now that the “legitimacy of international hegemony” depends on the same criteria as the legitimacy of domestic government. See LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS (1989); Lea Brilmayer, *The Legitimacy of International Hegemony* (unpublished draft). See also FRANCK, *supra* note 91. Franck is currently exploring ways to apply the fairness principles developed by John Rawls to the evaluation of international legal norms. Franck, *supra* note 2. In an equally philosophical tradition, Fernando Tesón is working to revive the Kantian moral tradition in international law. See Fernando Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992); Fernando Tesón, *Realism and Kantianism in International Law*, 86 ASIL PROC. 113 (1992).

Deficiencies of the Institutional Agenda

The above account is ultimately one of increasing convergence between international political science and international law, uniting scholars working in the most vigorous and dynamic areas of their respective fields. Moreover, in the wake of the Cold War and the dramatic revitalization of the United Nations, international law is enjoying a resurgence of interest from all sides.⁹⁹

Why not stop here? The answer is that Institutionalism, however formulated, remains theoretically inadequate in many ways. Like all international relations theories, it is admittedly a partial theory. There is much of the world that it does not explain; and some of what it purports to explain, it explains poorly. Some of its deficiencies are of direct concern to international lawyers.

First, as Institutionalists themselves admit, regime theory cannot yet account for the creation of regimes in the first place, and how and when they are likely to change. The starting point for the applicability of regime theory is the assumption that, to the extent that states have mutual interests, the perceived benefits of cooperation will outweigh the costs; in such a case the existence of a regime will facilitate cooperation in all the ways outlined above. But when will the perceived benefits outweigh the costs? Who is doing the perceiving? For international lawyers, the answers are important. They are different ways of asking, What are the optimal conditions for the functioning of international law?

These problems are likely to be exacerbated to the extent that the "rationalist" approach to institutions remains dominant. The intellectual blinders imposed by an insistent "rationalism" may be most hampering precisely when trained on periods of the greatest change in international relations, when human endeavors are self-consciously "transformative."¹⁰⁰ Here the flaw in Institutionalism, for international lawyers, is its inability to relate positive description to normative aspiration. What nations "want," in either material or ideal terms, is irrelevant. The system, whether institutionalized or noninstitutionalized, dictates what they can get.¹⁰¹

Second, Institutionalism cannot take account of individual-state relations, either domestic or transnational, or transnational individual-individual relations. It thus cannot provide a politico-economic theory to help conceptualize and analyze the law that regulates these relations. This deficit is considerable, because such areas of law include human rights law, transnational litigation and arbitration law, and the law regulating international business transactions. Such law regulates domestic and transnational actors, which in regime theory are once again subsumed beneath the state.¹⁰²

Third, *neither* Institutionalism *nor* international legal scholarship can take account of, much less use, evidence of the "democratic peace": evidence that "with

⁹⁹ This author has recently been approached by the editors of two well-respected journals in international political science seeking advice on how to increase the number of articles they publish on international law.

¹⁰⁰ I am indebted here to John Gerard Ruggie's remarks on a panel entitled "Neorealism and Neoliberal Institutionalism" at the September 1992 American Political Science Association Annual Meeting in Chicago.

¹⁰¹ For a fuller explication of this difference, see Andrew Moravcsik, *Liberalism and International Relations Theory* (working paper, Center for International Affairs, Harvard University, 1992).

¹⁰² For an explanation of this shift away from an emphasis on transnational actors in international relations back toward state-centric modes of analysis by one of its principal architects, see KEOHANE, *supra* note 79, at 8.

only marginal exceptions, democratic States have not fought each other in the modern era.”¹⁰³ As Bruce Russett puts it, drawing on a growing pile of studies of increasing statistical rigor, “This is perhaps the strongest non-trivial or non-tautological statement that can be made about international relations.”¹⁰⁴ These same studies strongly suggest that the correlation is not spurious, that a *causal* link exists between reciprocal peaceful behavior and the internal social, political and economic configuration of states.

Leading Institutionalists have emphasized the need to turn to theories of domestic politics to supplement regime theory.¹⁰⁵ Their interest, however, is limited to using domestic political factors to explain outstanding questions of regime creation and change. This overriding emphasis on the link between the level of *institutionalization* and international cooperation precludes them from taking account, in any systematic fashion, of evidence on sources of peace and cooperation unrelated to institutions. International lawyers, on the other hand, are hamstrung by their disciplinary insistence on what Hoffmann has described as the “formal homogeneity of a legal system whose members are supposedly equal.”¹⁰⁶ The inability to differentiate between different types of state on the basis of domestic regime type has been implicit in international law since Grotius. It is grounded in the very concept of “sovereign states” as the equal and identical subjects of international law, and buttressed by the affirmative norms of sovereign equality and nonintervention.

In sum, whether convergent or divergent on the relevance and function of international law and institutions, mainstream international relations theory and international legal scholarship share a set of fundamental analytical assumptions. Theirs is a “top-down” analysis, beginning with standard Realist assumptions that unlike entities (states) can be treated as like for analytical purposes, by virtue of the constraints and incentives imposed by the international system. Whether that system includes patterns of institutionalized behavior, shaped and conditioned by law and international organizations, is a secondary question. At its core, the model of “how nations behave” is a “black box” or “billiard ball” model of the international system, in which states are regarded as identical in form and function and opaque with regard to domestic regime type and state-society relations.¹⁰⁷

III. A NEW PARADIGM: THE LIBERAL AGENDA

A rich vein of collaborative scholarship between Neo-Liberal Institutionalists and international legal scholars thus waits to be mined. Considerable common ground exists already; many remaining obstacles are matters as much of semantics as of conviction. But many international relations scholars and international law-

¹⁰³ Bruce Russett, *Politics and Alternative Security: Toward a More Democratic, Therefore More Peaceful, World*, in *ALTERNATIVE SECURITY: LIVING WITHOUT NUCLEAR DETERRENCE* 107, 111 (Burns H. Weston ed., 1990).

¹⁰⁴ *Id.*

¹⁰⁵ See KEOHANE, *supra* note 79, at 14, 173–74; Helen Milner, *International Theories of Cooperation among Nations: Strengths and Weaknesses*, 44 *WORLD POL.* 466 (1992).

¹⁰⁶ Hoffmann, *supra* note 46, at 113.

¹⁰⁷ Arnold Wolfers coined the “billiard ball model” as a description of Realist assumptions. He was less interested in the opacity of the individual units, however, than in explicating the Realist assumption that states were the only international actors whose actions mattered, notwithstanding evidence of proliferating supra- and subnational actors. ARNOLD WOLFERS, *DISCORD AND COLLABORATION: ESSAYS ON INTERNATIONAL POLITICS* 19–24 (1962).

yers alike will want to push further. They will want answers to the various questions posed above. And above all, they will want a theoretical framework that takes account of increasing evidence of the importance and impact of so many factors excluded from the reigning model: individuals, corporations, nongovernmental organizations of every stripe, political and economic ideology, ideas, interests, identities and interdependence. It must be a framework that will take account of and explain the democratic peace, that will focus on the striking differences in the international realm over time, as well as the similarities. Such a framework would improve the quality of debate within both disciplines and forge a new interdisciplinary bridge between them.

An alternative framework can be found in international relations theory. It is Liberalism. A wide variety of "liberal" theories have long been offered as alternatives to or critiques of both Neo-Realism and Neo-Liberal Institutionalism, but "Liberal" theory as a whole has been conceptualized as a grab bag or "tradition" of loosely linked beliefs and approaches. It has never been reduced to a theoretical template or "paradigm," a set of core propositions from which a wide array of subtheories could be deduced. Its utility as a *competitor* to Realism and Neo-Liberal Institutionalism has been correspondingly reduced, since it has often been difficult for international political scientists to pinpoint where Realist or Neo-Liberal Institutionalist explanations end and Liberal theories begin.

These conceptual problems are being remedied. The core propositions of "Liberal theory," or a "Liberal theoretical framework," have been distilled as an explicit alternative to reigning theories.¹⁰⁸ The remainder of this article sets out the core assumptions of Liberal theory and explores their very different implications for interdisciplinary scholarship in international law and international relations.

The Core Assumptions of Liberal Theory

Three fundamental assumptions shared by all Liberal theories are the following.

(1) "*The fundamental actors in politics are members of domestic society, understood as individuals and privately constituted groups seeking to promote their independent interests. Under specified conditions, individual incentives may promote social order and the progressive improvement of individual welfare.*"¹⁰⁹ Here Liberal theory rejects a foundational premise of both Realism and Institutionalism: that the structure of the international system, whether defined to take account of institutionalized state practices or not, is the primary determinant of state behavior. Liberals analyze state behavior primarily as a function of the constraints placed on state actors by being embedded in domestic and transnational civil society. Note that Liberals do not seek to rule out the state as the primary *agent* of international action; once state interests are determined, governments do pursue them in a rational unitary fashion. But the underlying source of those interests is social rather than systemic.

¹⁰⁸ Moravcsik, *supra* note 101. For an effort to identify and organize the group of theorists working "within the Liberal tradition," see Mark Zacher & Richard Matthew, Liberal International Theory: Common Threads, Divergent Strands (paper presented at American Political Science Association Annual Meeting, September 1992). Zacher and Matthew explicitly recognize that Liberalism's "propositions cannot be simply deduced from its assumptions," precisely the task that Moravcsik sets himself.

¹⁰⁹ Moravcsik, *supra* note 101, at 6.

(2) “All governments represent some segment of domestic society, whose interests are reflected in state policy.”¹¹⁰ Here is the link between the individual and group actors in domestic and transnational society and state behavior. Liberals begin by identifying patterns of interests that are determined by the purposive actions of individuals and groups. The next step is to determine which particular interests—which segment of society—are represented by a particular state government. The answer depends on the type of government in question, ranging from military dictatorship or oligarchies to democracies.

(3) “[T]he behavior of states—and hence levels of international conflict and cooperation—reflects the nature and configuration of state preferences.”¹¹¹ The determination of the precise social interests represented by a particular government permits the specification of that government’s “preferences”—the agenda that it will seek to promote in international bargaining. It is about the bargaining process that Liberalism makes its third fundamental assumption. Where Realists claim that power will determine bargaining outcomes, and Institutionalists argue that it is power as conditioned by institutionalized practices, Liberals claim, straightforwardly enough, that “what states do is determined by what they want.”¹¹² More formally, the strength and intensity of a particular preference will determine how much the state is willing to concede to obtain that preference, which in turn will determine its likelihood of success in achieving the bargaining outcomes it desires. This is a counterintuitive claim, here stated in a stronger form than is necessarily subscribed to by all Liberals. Nevertheless, its formulation here represents the Liberal antipode to Realist and Institutionalist claims about the determining power of the international system.

A Liberal Reconceptualization of the Role of Law in International Politics

The premises from which Liberal analyses of international relations proceed suggest a very different agenda for interdisciplinary work on common questions of international peace and cooperation. International lawyers seeking to build on insights from international relations theory will discover a new conceptual apparatus with which to analyze both old and new areas of law. On the other hand, political scientists interested in the impact of law on international relations will find that Liberal theory either points in the direction of bodies of law they may have been unaware of or presents familiar legal phenomena in a very different light. The interdisciplinary agenda outlined below briefly reviews potential implications from the perspective of both fields.

Comparative constitutional law and international order. The Liberal emphasis on domestic and transnational civil society and the representation of patterns of interests emerging from that society points to the importance of domestic constitutional law as a determinant of international behavior. To the extent that a government and its relationship with the society it governs are in fact constituted by a constitution, the limitations placed on that government will establish the boundaries of its ability to encumber or foster the ongoing development of civil society both within and across state borders. The constitution will also determine the extent to which and how resulting social interests (including economic interests) are represented, both by ensuring protections for minority rights and by structuring elections.

¹¹⁰ *Id.* at 9.

¹¹² *Id.* at 11.

¹¹¹ *Id.* at 10.

Comparative constitutional law offers a rich lode of information on questions such as the relative advantages of parliamentary versus presidential systems, different electoral schemes and separation of powers arrangements.¹¹³ Which questions international lawyers might decide to pursue depends on their international area of interest and the subtheory in political science that specifies the causal mechanism between a domestic variable and an international behavioral trend. For instance, international lawyers interested in the law of force would research the literature on the “democratic peace.” Maoz and Russett have recently distilled the findings of a wide range of studies in this area into two competing causal models, a “structural” model and a “normative” model. The structural model argues that democracies require complex political mobilization processes to engage in conflict.¹¹⁴ The normative model claims, by contrast, that “states externalize—to the extent possible—the norms of behavior that are developed within and characterize their domestic political processes and institutions,” and that the democracies resolve conflict under norms of compromise that promote “a fundamental sense of stability at the personal, communal, and national levels.”¹¹⁵

Armed with one or both of these hypotheses, an international lawyer could then conduct a study in comparative constitutional law with an eye to how different constitutional provisions can create checks and balances that make complex mobilization processes necessary, and/or the ways that both constitutional and statutory law can inculcate norms of cooperation and compromise. Here the paralysis that is often associated with divided government in a presidential system may appear in a new light, accustoming political actors to the need for compromise. Other promising lines of inquiry include the relationship between a well-functioning judicial system and the inculcation of stable expectations among private citizens,¹¹⁶ and the impact of the “juridicization” of legislative politics through the institution of judicial review.¹¹⁷ In conducting such a study, an international lawyer would be probing questions familiar to constitutional lawyers, but with a distinctive agenda directly relevant to the establishment and maintenance of world order.

The third normative implication of Liberal analysis is recognition of the “sovereignty paradox” in connection with the relations between liberal states and nonliberal states. The reconceptualization of sovereignty described above is based on phenomena observable primarily in relations among liberal states. Relations with

¹¹³ See, e.g., Juan J. Linz, *Transitions to Democracy*, WASH. Q., Summer 1990, at 143 (explores these issues in different contexts). The interest in comparative constitutional issues has been so strong in recent political science that it has even spawned a journal, *The Journal on Democracy*.

¹¹⁴ Zeev Maoz & Bruce Russett, *Normative and Structural Causes of Democratic Peace, 1946–1986*, in GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD-WAR WORLD (forthcoming 1993) (manuscript at 6–7, on file with the author).

¹¹⁵ *Id.* at 4.

¹¹⁶ By comparing the evolution of judicial systems in well-established liberal states with the emergence of judicial systems in transitional states, we may be able to learn more about the link between domestic law and international order.

¹¹⁷ One of the pioneers of this type of analysis is Martin Shapiro, a political scientist trained in comparative politics who teaches in a law school. See MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981). This type of analysis has also spawned a growing literature on courts in liberal societies, analyzing questions such as the growth of judicial review in France in the face of a long tradition of parliamentary sovereignty and comparing the political role of courts in France and Germany. See ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* (1992); Alec Stone, *Judging Socialism: Constitutional Politics in France and Germany*, COMP. POL. STUD. (forthcoming 1993).

nonliberal states, by contrast, are more likely to be conducted by the political branches. The result is that *in court*, pleas of the prerogatives of sovereignty are more likely to be honored with respect to nonliberal states than with respect to liberal states. Just as family members are often freer with one another and less respectful of the boundaries of politeness than they might be with strangers or new acquaintances, so too with members of the family of liberal nations. Their legal relations, at least, reflect a similar type and degree of conflict, conducted in the context of underlying commonality and unity of interest.

A theoretical framework for transnational law. Liberal theory provides a powerful theoretical framework for the analysis of transnational law. Using the term more narrowly than the classic definition advanced by Philip Jessup,¹¹⁸ I define transnational law to include all municipal law and a subset of intergovernmental agreements that directly regulate transnational activity between individuals and between individuals and state governments.¹¹⁹ Although this area of law is growing apace,¹²⁰ it remains a definition and a category without a theory. The result is a seemingly random hodgepodge of doctrines and topics connected as a field only by a common “international” or “foreign” element.¹²¹ As a reviewer of a leading casebook in the area queried, “Is there a field in this class?”¹²²

From a Liberal standpoint, transnational law helps structure patterns of individual and group interaction in transnational society, patterns that in turn generate interests that shape and constrain state action. Transnational law is also likely to contribute to the “fundamental sense of stability” identified by Maoz and Russett as a distinctive characteristic of liberal societies that buttresses the probability of peace with other liberal societies. How and to what extent transnational law performs these functions is a subject for political scientists working within the Liberal paradigm. At the same time, the Liberal emphasis on the social interaction of individuals and groups as the underlying determinants of state behavior recasts transnational law as a primary contributor to world order. If, to take one definition, the criterion for a functional “field” of law is whether it seeks “‘to realize some underlying kind of justice,’ ”¹²³ then transnational law, whether subdivided into international litigation, international business transactions or traditional private international law, seeks to accomplish the very same aims long pursued by the

¹¹⁸ PHILIP C. JESSUP, *TRANSNATIONAL LAW* (1956).

¹¹⁹ This definition subsumes traditional private international law but does not embrace all of public international law.

¹²⁰ As I define it, “transnational law” includes subjects labeled international litigation, international practice, and much of international business transactions. Casebooks in this area are proliferating, written by both practitioners and academics.

¹²¹ To complain of the absence of an overriding organizing principle or conception that would provide identity and cohesion to this subject area as a *field* is not to say that the material itself does not have common elements. Born and Westin, for instance, identify five “recurrent themes”: interest balancing, foreign relations, federalism, public international law and international comity. GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS COMMENTARY AND MATERIALS* 3 (1st rev. ed. 1990).

¹²² Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456 (1991) (reviewing BORN & WESTIN, *supra* note 121 (1st ed. 1989)). Teachers of international business transactions similarly warn students of the conceptual incoherence of the field. Private communication from Professor Jay Westbrook, University of Texas Law School (Dec. 7, 1992).

¹²³ Burbank, *supra* note 122, at 1458 (quoting Michael Moore, *A Theory of Criminal Law Theories*, in *TEL AVIV STUDIES IN LAW* (Daniel Friedmann ed., 1991)).

practitioners of public international law, and may arguably do so with greater success.¹²⁴

Within this unified framework, a number of questions should prove of interest to both international lawyers and political scientists. First, how do domestic legal doctrines encourage or discourage transnational economic interaction? Private international lawyers have pointed out connections between a country's stance on personal jurisdiction doctrines and its friendliness or hostility to international trade.¹²⁵ In the United States, the Supreme Court has decided an entire line of cases concerning forum selection and the enforceability of arbitral awards on the assumption that an overly "parochial" attitude toward enforcement of U.S. law or insistence on litigation in U.S. courts would handicap U.S. business in international transactions.¹²⁶ Beyond the judicial system, legislative and executive positions on the enforcement of U.S. laws abroad have softened, paying at least lip service to the values of comity and reciprocity.

A second line of inquiry would link the political findings on the value of stability to the traditional system of conflicts of law, which long recognized the importance of stable expectations in fostering transnational commerce. From Story and Dicey forward, conflicts scholars have understood that a central purpose of a conflicts system is to give individuals some way to know the rules that govern their conduct, on the premise that it is unfair and irrational to let those rules be determined after the fact by the happenstance of the tribunal's location. National courts must thus be prepared to adopt general principles allowing them to apply each other's law when fairness and predictability so require.¹²⁷ As Dicey observed, "The growth of rules for the choice of law is the necessary result of the peaceful existence of independent nations combined with the prevalence of commercial intercourse."¹²⁸

The use of Liberal theory to illuminate the study of private international law, and vice versa, would also extend to the fast-growing law of international com-

¹²⁴ Note that the proposed contribution of transnational law to world order differs from the model developed in RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* (1964). Falk saw private international law as constituting a "horizontal" international legal order that operated by stabilizing *state* expectations. Liberalism, by contrast, focuses on the stabilization of *individual* expectations.

The Liberal approach should equally be distinguished from more eclectic efforts to supplement or amend an essentially state-centric analysis by taking transnational actors into account. Such efforts are best exemplified in political science by Robert Keohane and Joseph Nye's model of "complex interdependence," which begins with the state and then supplements state action with inquiry into the transnational activities of individuals and interest groups. ROBERT O. KEOHANE & JOSEPH S. NYE, JR., *POWER AND INTERDEPENDENCE* (1977). Similarly, a growing number of international lawyers have called for formal acknowledgment of the increasing importance of individuals and groups as subjects of public international law and for a move away from traditional state centrism. See, most recently, Mark W. Janis, *International Law?*, 32 HARV. J. INT'L L. 363 (1991) (arguing that we should return to the "law of nations" in place of the overly state-centric "inter-national law").

¹²⁵ See Arthur T. von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 280 (1983).

¹²⁶ See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

¹²⁷ Judge Cardozo similarly insisted, "courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness." *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201-02 (N.Y. 1918).

¹²⁸ A. V. DICEY, *A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS* 8 (2d ed. 1908).

mercial arbitration. A Liberal analysis would highlight the intersection of the public and private spheres underpinning a law that formally regulates individual merchants outside national legal systems but is ultimately dependent on them.¹²⁹ This law is developed by international arbitral tribunals, a private hybrid of public international law, different national laws and general equitable principles. Further, the process of international commercial arbitration itself

begins as a private arrangement between the parties. It continues by way of private proceedings, in which the wishes of the parties are of great importance. Yet it ends with an award which has binding legal force and effect and which, on appropriate conditions being met, the courts of most countries of the world will be prepared to recognise and enforce. *The private process has a public effect, implemented by the support of the public authorities of each state expressed through its national law.*¹³⁰

Here is perhaps the quintessential Liberal regime: a body of rules regulating transnational society that fosters the creation of transnational patterns of interest likely to shape state action, but that depends at the same time on the performance of certain state functions. On this foundation of domestic and transnational state-society relations rests part of the architecture of a Liberal international system.

A third and final question is the extent to which transnational law can be understood as a distinctive feature of law among liberal states. I have sketched such an argument elsewhere with respect to the act of state doctrine, arguing that the doctrine helps circumscribe a zone of "legitimate difference" among liberal states within which foreign laws can either be applied as law or overturned in accordance with mutually recognized legal principles.¹³¹ Many other transnational legal doctrines lend themselves to a similar analysis, revealing internal fissures that upon closer examination appear related to objectively identifiable differences between liberal and nonliberal states. Adequate forum requirements in forum selection and *forum non conveniens* cases, for instance, are applied consistently with the liberal-nonliberal divide; the evolution of public policy exceptions in choice-of-law doctrines and recognition and enforcement of foreign judgments may yield insights about the dynamic of liberal interdependence; and the rise of interest-balancing tests in areas ranging from extraterritoriality¹³² to personal jurisdiction¹³³ to treaty application¹³⁴ may be characteristic of a density of transnational interaction found primarily among liberal states.

A Liberal analysis of public international law. Liberal theory also has important implications for the analysis of international institutions, including, although not

¹²⁹ Susan Strange has written of the undermining of national authority by the spread of the "international business civilization." Susan Strange, *The Name of the Game, in SEA-CHANGES: AMERICAN FOREIGN POLICY IN A WORLD TRANSFORMED* 238 (Nicholas X. Rizopoulos ed., 1990). At the same time, however, she notes that "a central concern of th[is] civilization is the securing of property rights, for individuals and for firms." *Id.* at 263. It is time that international political economists purveying such perspectives factored transnational law into their global equations.

¹³⁰ ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 7 (1986) (emphasis added).

¹³¹ Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992).

¹³² See *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976); *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); U.S. DEPARTMENT OF JUSTICE, *ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS* (1988) (for private antitrust actions).

¹³³ *Asahi Metal Indus. Co. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987).

¹³⁴ *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987).

limited to, customary and conventional international legal regimes and international organizations. On the one hand, a Liberal approach fills many of the acknowledged gaps in current regime theory by providing the tools to determine when there will be mutual interests that can be furthered by international cooperation, hence specifying the preconditions that Institutionalists hold necessary for strong and effective institutions. On the other hand, Liberal theory also suggests that in many instances institutions will be epiphenomenal; by pinpointing underlying interests, it will permit Institutionalists to isolate hard cases in which institutions caused an outcome that could not have been predicted by patterns of underlying interests. To the extent that the "institution" in question is a legal institution, a Liberal approach will permit a more rigorous demonstration of the impact of law.

This debate is a *causal* debate, of primary interest to political scientists. For international lawyers who wish to proceed from the assumption that international law exists and matters, Liberal theory offers an equally interesting, and, from a traditional international lawyer's point of view, heretical, proposition. From a Liberal perspective, regimes governing liberal states are likely to be more effective in accomplishing their professed aims than regimes governing liberal and nonliberal states (other than purely technical regimes such as international traffic agreements). This proposition generates a radical and stimulating research agenda, calling for a new comparative look at regimes ranging from the United Nations to the International Monetary Fund to, above all, the European Community. Indeed, one of the most powerful reorienting effects of Liberal analysis is the transformation of the Community from anomaly to archetype. In the remainder of this section, I will offer a very preliminary Liberal account of the evolution of the Community as a prototype for the role of public international law among liberal states.

The Treaty of Rome was concluded in 1957 as an *international* treaty. The fathers of the European Community never intended to make its provisions directly effective in the courts of the member states.¹³⁵ Nor, for that matter, did they intend to have the European Court of Justice play a particularly prominent role in the shaping and administration of the Community.¹³⁶ Yet the "constitutionalization" of the Treaty has been the Court's achievement, and the Court's alone.¹³⁷ As the Community takes another leap forward with the adoption of a new set of plans for economic and political union, the power and strength of Community law is such that Great Britain announced publicly that it sought separate treaties for European Monetary Union and European Political Union to avoid the jurisdiction of the Court of Justice.¹³⁸

¹³⁵ See HJALTE RASMUSSEN, *ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE* 249-50 (1986).

¹³⁶ Rasmussen argues that the drafters of the Treaty of Rome intended the new European Court of Justice to have even less power than was exercised by the Court of the European Coal and Steel Community. *Id.* at 220-22.

¹³⁷ Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 *AJIL* 1 (1981). As Stein and others have pointed out, the Court has often taken its cue from the Commission as regards the political climate in the member states to determine just how far it should go. Numerous political scientists have concluded that the Court was careful not to transgress the bounds of the political consensus of the Community. Nevertheless, its incremental style and successful wooing of the national courts both to expand its jurisdiction and to secure the enforcement of its judgments gradually pushed the bounds of Community law steadily forward.

¹³⁸ *Countdown to Maastricht*, *Fin. Times* (London), Nov. 18, 1991, §1, at 8.

Surely, it will be argued, the European Court was able to give the international law of the Treaty equivalent status to domestic law by relying on the initial political commitment of the member states to *unite*, to become some kind of a polity under law. As witnessed by the relaunching of the single market in 1985, however, and the still-tentative steps toward political union over thirty years after the original compact, the initial commitments were vague indeed. Beneath the clouds of rhetoric, the Treaty of Rome could have been interpreted much like any other economic treaty. The Court's famed "teleological" method of interpretation relies on "giving effect" to the original intentions of the parties as construed by the Court, even where those same parties had apparently failed to supply what the Court considers to be the necessary means to achieve those ends. On that basis the International Court of Justice should have been able to establish world peace by now.

A Liberal theorist would argue that the difference lies in the receptivity of the national courts of the Community's member states to accepting the possibility of supranational law as *law*, as a body of rules interpreted and applied by a nonpolitical entity. It is not simply that the member states are relatively homogeneous. It is that the substance of that homogeneity is a particular set of political and economic beliefs and institutions that are uniquely congenial to the independent operation of the rule of law. More concretely, the liberal institution of an independent judiciary charged with administering the rule of law permits the maintenance of a meaningful distinction between law and politics, even in tandem with widespread recognition of how political beliefs and values can influence legal choices. In this setting, international tribunals can enjoy a measure of the same legitimacy as domestic courts, and carry on a dialogue with domestic courts independent of the political authorities.¹³⁹

The nations of Europe will retain their identity and "sovereignty," however defined, as separate nations. At the same time, the fate of the Maastricht Treaty notwithstanding, European governments will increasingly set national policy at a supranational level. They will implement these policies as Community law. From a Liberal perspective, this law will not be a hybrid law suspended between the traditional poles of domestic and international law. It will be, and is now, a rich and fascinating paradigm for international law, finally made flesh within a deliberately and self-consciously defined community of liberal states.¹⁴⁰ Joseph Weiler recently suggested that his theory of the "bidirectional" relationship between

¹³⁹ This is a highly stylized account of the European Court of Justice, without reference to the extensive lobbying effort undertaken by the Court for support from the national courts, or its own political balancing act in gradually advancing its agenda. For such an alternative account, see Anne-Marie Burley & Walter Mattli, *Europe before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (forthcoming 1993). Nevertheless, I would argue that the existence of a common liberal culture and institutions provided the context in which such efforts and concerns were even possible.

¹⁴⁰ The Preamble to the Treaty of Rome commits the members of the European Community to "pool[] their resources to preserve and strengthen peace and liberty," and "call[s] upon the other peoples of Europe who share their ideal to join in their efforts." It should be noted that, in keeping with the liberal principles on which these states are based, the supranational lawmaking process will increasingly have to conform to democratic principles. Paradoxically, this will mean the devolution of some lawmaking power *away* from Community organs, under the principle of subsidiarity or other federalist (in the American sense) doctrines. It is also likely to mean greater transparency in Community decision making and greater input not only from the Community Parliament, but from *national* parliaments.

legal and political processes in the transformation of Community law from “soft” (international) to “hard” (domestic) law “could even be part of a general theory of international lawmaking.”¹⁴¹ It could, indeed, as could the work of many other Community scholars—when combined with a general theory of lawmaking in liberal states.¹⁴²

Rethinking the rules of the game. A Liberal approach to international relations and international law opens the door to a new normative agenda in international law that in turn could change the conceptual apparatus employed by international relations theorists.¹⁴³ The evolution of what Henkin calls the “submerged rules of

¹⁴¹ Joseph Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2426 (1991).

¹⁴² The Community could equally provide a rich lode of experience on institutional and organizational design. A Liberal analysis would emphasize the desirability of “embedding” public international institutions in domestic society, not only, as Ruggie has argued, to allow states to remain part of these institutions, but also to strengthen the institutions themselves by reshaping private expectations. See John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT’L ORG. 379 (1982). It is interesting to compare Keohane’s notion of “sovereign enmeshment,” arguing for the compliance-enhancing role of institutions in terms of their link to domestic legal and political processes. Keohane’s analysis proceeds from a strict and relatively static division between the systemic and unit levels of analysis, without taking into account individual and group actors or interests. See Keohane, *supra* note 96. The Liberal approach, by contrast, builds from a more holistic vision of state responses to domestic and transnational pressures.

¹⁴³ For some readers, Liberal analysis may appear to have much in common with McDougal-Lasswell jurisprudence. Both schools look beyond the state and emphasize the importance of individual and group actors as principal actors in world politics. Both schools posit that the internal characteristics of states determine their external behavior, leading both to emphasize the distinctive attributes of “liberal” states and the concomitant importance of comparative law, particularly comparative constitutional law. Both schools thus reject the positive and normative universalism projected by Realism, Institutionalism and traditional international law, substituting a differential analysis based on an underlying convergence of interests and values.

Appearances notwithstanding, these similarities belie important differences. First, McDougal’s projection of Lasswell’s model political decision-making process onto international politics (the “world power process” and the “world social process”) identifies *all* the possible participants in this process indiscriminately, without attempting to specify the causal relationships and the generative orderings among them. Liberal theory, by contrast, deliberately sets out to build a model of the international system that will serve as a carefully specified alternative to Waltzian Neo-Realism. It marries theories of interest formation in domestic and transnational society with theories of international bargaining. The result is a model that can specify, as a generative model should, how changes in one part of the model will affect actors and processes in another part, with a precise claim about how the causal arrows run.

A second basic category of differences between the two schools rests on the relative vulnerability of McDougal-Lasswell analysis and Liberal analysis to subjective manipulation. As some McDougal students have pointed out, the popular critique of McDougal-Lasswell jurisprudence for its supposed identification of the “law” with the subjective values of individual decision makers is based on a crude misreading or fundamental misunderstanding of McDougal’s work. Nevertheless, one such defender himself goes on to deplore the ultimate subjectivity of the various applications of this theory by McDougal himself and many of his associates. Falk, *supra* note 1, at 138–41. Many others in both law and political science have taken a similar view. See, e.g., CLAUDE, *supra* note 75, at 255–71; Hoffmann, *supra* note 46, at 116.

From the Liberal perspective, such critiques seem an inevitable concomitant of a theory in which lawyers themselves become policy scientists. McDougal and Lasswell promptly enlisted their theories as positive means to normative ends. In place of a false universalism, they urged differentiation in word and in fact—of *all* systems of public order: international, regional and potentially national. They devoted their efforts to teaching lawyers how to undertake this process—how to “appraise” systems of public order so as to distinguish the good from the bad and consequently elevate the good. In practice, they “urg[ed] the use of international law as a strategy to attain the goals of the democratic public order states and to frustrate the designs of their totalitarian adversaries.” Falk, *supra* note 1, at 142.

the game," fundamental concepts such as sovereignty and statehood, would result in a different analytical and operative construction of international reality. Liberal theory both buttresses and illuminates this agenda, as illustrated by the following three examples.

First, international lawyers are amending the traditional definition of statehood. Scholars such as Thomas Franck and Gregory Fox are working to establish the international legal pedigree for a right of democratic governance.¹⁴⁴ If individuals do have a right to govern themselves, a government founded on any principle other than some form of self-government should no longer qualify for recognition as an independent state. The current criterion of "government" as one of the elements of statehood¹⁴⁵ must logically give way to "democratic government." Franck and Fox recognize these implications, and already advocate the application of some form of democratic criteria in the recognition process, although they favor proceeding with great caution.

A Liberal analysis of international law offers a new positive ontology to fit this new normative agenda. From the Liberal perspective, state behavior is best analyzed as a function of domestic and transnational behavioral patterns for which liberal and nonliberal states serve as an excellent proxy. To the extent that positive behavioral differences can be identified on the basis of this division, they will reinforce the intelligibility and utility of a normative distinction. Conversely, a norm of democratic governance helps to justify the positive Liberal distinction between liberal and nonliberal states.¹⁴⁶

A second reconceptualization illuminated by Liberal analysis is of the nature of territorial and jurisdictional sovereignty among liberal states. Empirical evidence suggests that, as a practical matter, the higher volume of exchanges of all kinds among liberal states creates a web of interrelationships that in turn make judicial infringements or "violations" of sovereignty much more likely.¹⁴⁷ Territorial boundaries become increasingly meaningless, so that situs analysis cedes its place to interest analysis. Indeed, the willingness to subject the matter in dispute to judicial scrutiny at all—even in the face of considerable political controversy—is significantly greater if the state in question is a liberal state.¹⁴⁸

In this conception, lawyers perform their own social science in the guise of policy science. The artificial and wavering line between positive and normative, between "is" and "ought," cannot long withstand such fusion. No independent check exists on the lawyers' findings. In the Liberal model, by contrast, it is left to the political scientists to uncover the links between domestic and transnational social patterns and distinctive patterns of state behavior. The lawyers must be bound by the results of this research, both in ascertaining what the law is and in thinking about what it should be. The Liberal approach to interdisciplinary collaboration thus maintains the separate identities and functions of both disciplines. But it harnesses them on a common track, one that remains largely unexplored.

¹⁴⁴ Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992). See also Theodor Meron, *Democracy and the Rule of Law*, 153 WORLD AFF. 22 (1990); Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77 (1988) (arguing for the right of political participation as a "programmatic right").

¹⁴⁵ See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 75 (3d ed 1979).

¹⁴⁶ There is indeed a difference between "liberal states" and "democracies," in that the definition of a liberal state requires constitutional protections and private property rights in addition to self-governance. In practice, however, I know of no genuine democracy that does not also at least aspire to these other attributes.

¹⁴⁷ I use the term "violation" of sovereignty because that is how certain judicial decisions are often perceived by the representatives of the foreign government in question.

¹⁴⁸ See Burley, *supra* note 131.

On the other hand, relations among liberal states are more likely to be conducted on a principle of "legitimate difference" or mutual recognition of each other's laws, on the implicit ground that sufficient commonality exists to render many country-specific differences along a wide range of policy choices irrelevant. In both directions, the figurative baseline of territorially defined absolute sovereign power seems increasingly inapposite. Within the liberal zone, then, the all-purpose powers and privileges currently denoted by sovereignty may in fact attach to different states in different issue-areas as a function of strength of interest and regulatory purpose. As the "dynamic density" of individuals and issues increases within this zone, rendering the inadequacy and irrelevance of traditional concepts of sovereignty apparent, Liberal analysis and prescription could highlight an alternative baseline for legal relations based on reciprocal recognition of mutual interest rather than exclusive zones of power.¹⁴⁹

Potential Deficiencies in a Liberal Analysis

Although many theories of international relations have adopted or been tagged with the rubric "liberal," the nonutopian Liberal theoretical framework presented here is a new effort to challenge the dominance of Realism. Only time, scholarly debate and practical application will determine its long-term power and utility. Several potential difficulties already loom on the horizon.¹⁵⁰ The brief discussion of some of these problems below helps illuminate not only likely points of dispute between the Institutional and the Liberal agendas, but also how in the end these agendas fit together.

Liberals operating within this framework must be able to deduce substantive theoretical propositions from its core assumptions. The leading example of such a proposition is the claim that liberal states do not go to war with one another. My various hypotheses about how the legal relations of liberal states are likely to vary from legal relations between liberal and nonliberal states would also meet this requirement. Nevertheless, Liberal international relations theorists using this framework will be required by their Realist and Institutional colleagues to demonstrate its utility in generating a wider range of more specific propositions. To the extent they succeed, they will produce coherent empirical research programs from which international lawyers working within the same analytical framework stand to profit. Should they fail, the eclecticism, incoherence and utopianism that has long plagued Liberalism is likely to continue.

A second problem concerns the *relative* power of Liberalism versus Realism and Institutionalism. Even assuming that Liberals do succeed in formulating substantive theoretical propositions, under what conditions will those propositions explain *more* than Realism and Institutionalism? In other words, even if Liberal

¹⁴⁹ Ruggie has emphasized the importance of the Durkheimian concept of "dynamic density," defined as "the quantity, velocity, and diversity of transactions that go on within society," to the changing definition of sovereignty. John G. Ruggie, *Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis*, 35 *WORLD POL.* 261, 281-85 (1983). Kratochwil has taken these insights further in his work on the nature of boundaries and the resurrection of the Roman concept of dominion. Friedrich Kratochwil, *Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System*, 39 *WORLD POL.* 27 (1986). See also Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 *HARV. L. REV.* 1273 (1990).

¹⁵⁰ I am indebted to Robert Keohane for a personal communication highlighting many of these points.

propositions offer a more accurate *description* of empirical phenomena, do they ultimately add anything to our ability to explain and predict such phenomena?¹⁵¹ If not, why displace the relative parsimony and power of Realism and Institutionalism? International lawyers might correspondingly argue that even if a distinction between liberal and nonliberal states in the legal realm is empirically verifiable, its prospective conceptual and normative benefits do not warrant significant departure from the traditional framework of sovereign equality and identity. For political scientists, the relative explanatory power of one paradigm over another is ultimately an empirical question. International lawyers should prepare to follow this debate, to complement it with their own research within the Institutional and Liberal frameworks, and to draw their own conclusions.

CONCLUSION: A DUAL AGENDA

However the above debate ultimately plays out, international lawyers should above all consider its significance in light of the original Realist challenge. Not one, but two powerful responses now exist within political science, responses that recognize the importance and relevance of international law under specified conditions. The prospects for genuine interdisciplinary collaboration, to the benefit of both disciplines, have never been better.

Further, although much of the debate will be conducted *between* Institutionalists and Liberals, in the end both approaches will recognize the complementarity of the other. Institutionalists will continue to believe that systemic explanations provide the most powerful and parsimonious starting point, but that explanations focusing on domestic politics and individual action will be important residual tools. Liberals, on the other hand, will claim that Liberal theories are necessary to explain the formation of state interests, but that Institutional theories are critical at the bargaining stage. In either case, legal adherents of both schools will find a bridge to each other, as well as to fellow-traveling political scientists.

Yet another way to envision this dual agenda is to return to my own conceptualization of how Liberal theory can be applied to international legal studies. I suggest that Liberal insights will prove most fruitful in guiding the study of various kinds of legal relations among liberal states. Much Institutional scholarship, on the other hand, whether conducted by international lawyers or political scientists, will prove particularly applicable to the explanation and analysis of relations between liberal and nonliberal states. The world is likely to remain heterogeneous, and brutal, for centuries yet, and the painfully accumulated store of knowledge about how to ensure at least minimal regulation of the relations between competing sovereigns will serve diplomats and decision makers for a long time to come.

These caveats notwithstanding, we are on the edge of a new fault line in international relations. The emergence of this line emphasizes the transnational ties between states that share political and economic values and institutions, states that both permit independent action and initiative by individuals and groups in domestic and transnational civil society and provide the political mechanisms to

¹⁵¹ On the distinction between explanation and understanding as a means of classifying different types of international relations theories, see MARTIN HOLLIS & STEVE SMITH, *EXPLAINING AND UNDERSTANDING INTERNATIONAL RELATIONS* (1990). To offer a concrete example, even if it is true that individuals are the primary actors that determine the behavior of states, if our model of state behavior adequately captures the effects of individual behavior, why not preserve the fiction of states as the primary actors?

ensure representation of the resulting patterns of interest. Political, economic and, ultimately, legal relations among such states will increasingly differ in their modalities, consequences and implications from political, economic and legal relations between liberal and nonliberal states. Liberal international relations theory provides international lawyers with a conceptual apparatus to understand and analyze this phenomenon and gradually to build it into law.

Overall, international lawyers can ill afford to ignore the growing wealth of political science data on the world they seek to regulate. The measurements may be imprecise, the theories crude, but the whole offers at least the hope of a positive science of world affairs. As an adolescent discipline, international political science long rejected the insights of international law. As it grows, it rediscovers what international lawyers never forgot, but with added insights of its own. In the end, law informed by politics is the best guarantee of politics informed by law. The dual interdisciplinary agenda outlined here offers hope of reaching both goals.